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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1964

**No. 380**

**RONALD L. TODD, et al.,**

*Petitioners,*

vs.

**JOINT APPRENTICESHIP COMMITTEE, etc., and BETHLEHEM STEEL COMPANY, and LOCAL UNION NO. 1, etc., et al.,**

*Respondents.*

**Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit**

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## Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

Petitioners, Ronald L. Todd, Michael Cochran and James Hill, respectfully pray for a writ of certiorari to the United States Court of Appeals for the Seventh Circuit to review its judgment vacating a judgment and decree of the United States District Court for the Northern District of Illinois granting petitioners a preliminary injunction, and remanding the case to that court with directions to dismiss the complaint as to all defendants as moot.

## OPINIONS BELOW.

The opinion of the District Court for the Northern District of Illinois is reported at 223 F. Supp. 12, and is attached hereto as Appendix A, pp. 1a-28a.

The opinion of the United States Court of Appeals for the Seventh Circuit is reported at 332 F. 2d 243, and is attached hereto as Appendix B, pp. 29a-37a.

## GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED.

1. The date of the judgment sought to be reviewed was May 26, 1964.

2. No petition for rehearing was filed and no order has been entered granting an extension of time within which to file a petition for certiorari.

3. The statutory provision believed to confer jurisdiction on this Court to review the judgment below by writ of certiorari is 28 U.S.C. 1254(1).

## QUESTION PRESENTED FOR REVIEW.

Where a district court in a class action finds that Negroes have been totally excluded from an apprenticeship program jointly financed and controlled by a union, employers, the federal and a state government, and a board of public education, and the court issues a preliminary injunction requiring admission of two of the named plaintiffs to the apprenticeship program and the union, but stays enforcement of the decree pending appeal, is it proper for the Court of Appeals to order dismissal of the complaint as moot simply because the first employer which undertook to hire plaintiffs as apprentices completed its sub-contract on a single federal construction job after the effective date of the decree but before the appeal was considered on the merits?

## CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED.

Involved are the Fifth and Fourteenth Amendments to the Constitution of the United States (Appendix C, p. 38a); 28 U.S.C., §§1331, 1343(3), 1346(a)(2), and 1361; 29 U.S.C., §§157 and 158; 42 U.S.C. §§1981 and 1983 (all set forth in Appendix D, pp. 39a-47a; Rules 17(b) and 23(a)(3) of the Federal Rules of Civil Procedure (Appendix E, p. 48a); and Presidential Executive Order No. 10925, March 8, 1961, 26 F.R. 1977 (Appendix F, pp. 49a-64a).

## STATEMENT OF THE CASE.

On October 26, 1962, defendants Paschen Contractors, Inc., and Peter Kiewit Sons' Co. (Contractor), entered into a contract with the General Services Administration (GSA) to construct a United States Courthouse and Federal Office Building in Chicago, Illinois, to be paid for, from and with public funds of the United States. The Contractor then entered into various sub-contracts including one with defendant Bethlehem Steel Company (Bethlehem) for the fabrication and erection of structural steel on that building. Construction on the building was begun shortly thereafter and has continued down to the present time.

Both the contract and sub-contract specifically included, by reference, the terms of Presidential Executive Order No. 10925, March 6, 1961. That order, *inter alia*, prohibits racial and other discrimination in employment on government contracts such as this one. Those contracts also provided that apprentices would be permitted to work on the job only under a bona fide apprenticeship program registered and recognized either by the state or the federal government.

The Iron Workers Bridge and Structural Union, Local No. 1, and Iron Workers District Council of Chicago & Vicinity, which together with certain of their officers and representatives are defendants herein (Union), has a collective bargaining agreement with Bethlehem whereby it was the sole supplier of ironworkers to Bethlehem on the federal courthouse.

The Joint Apprenticeship Committee of the Steel Workers of Chicago, made up of representatives of employers

in the Chicago area and the Union, which Committee and its members are defendants (the Joint Committee), is now, and has been since inception of the program in 1952, responsible for the administration of the ironworker apprenticeship program in the Chicago area. That program was approved in 1953 by the United States Department of Labor of which the defendant Alvin Dost was Regional Director of the region which includes the Chicago area.

Under the terms of the program any male between 18 and 25 may be indentured by and to the Joint Committee as an ironworker apprentice. He then begins a three year combination of on-the-job and school training. The Joint Committee endeavors to keep him continuously employed during his apprenticeship and during the life of the program no apprentice has been unemployed for more than a day or two during the construction season. Apprentices are paid a minimum hourly wage of $2.91 for both work and school attendance with double time for school attendance in the evening.

The school portion of the program is provided at Washburne Trade School, a public school operated by the Board of Education of the City of Chicago, one of the defendants herein, a municipal corporation of the State of Illinois operating the public school system in the City of Chicago with public funds, facilities and employees. The teachers in the apprenticeship program are part time employees of the Board of Education selected on the advice of the Joint Committee, and paid by the Board of Education which in turn is reimbursed for about one-half of these salaries by the State of Illinois from federal funds allocated to the state for purposes of apprentice training.

In accordance with the requirements of Presidential Executive Order No. 10925, the Contractor reported to

GSA, of which the defendant Dominic Tesauro is the Regional Administrator, that on March 25, 1963, there were no Negroes, either journeymen or apprentices, in the Union. Bethlehem reported to GSA on May 15, 1963, that as of April 14, 1963, it had a total of 101 employees on the project site of whom 79 were structural ironworkers, 6 being apprentices, and that none of these employees was a Negro. Later, Bethlehem reported to GSA that as of June 16, 1963, it had 146 employees on the project site of whom 128 were structural ironworkers, 8 being apprentices, and that none was a Negro.

On May 23, 1963, on demand by GSA, Bethlehem requested of the Union written assurances that the Union would comply with the non-discrimination policies of Executive Order No. 10925. The Union did not provide such a statement. At about the same time, the Union informed Tesauro, Bethlehem and Dost that it would not accept Negro structural ironworkers or apprentices for work on this construction project.

The plaintiffs, Ronald L. Todd, Michael Cochran and James Hill are male Negroes ranging in age from 18 to 23. On or about June 7, 1963, they were referred to the Contractor by the Illinois State Employment Service and the Department of Labor as applicants for employment as ironworker apprentices after having been examined and found to be possessed of both aptitude for, and interest in, that trade. About two weeks later Bethlehem examined the plaintiffs and found them to be qualified to be hired as apprentice ironworkers. On the same day each of the plaintiffs properly executed and filed an application for indenture as an ironworker apprentice with the Joint Committee. On or about June 28, 1963, Bethlehem requested the Joint Committee to indenture two of the plain-

tiffs and stated that they would be employed if they were indentured. None of the plaintiffs was ever indentured by the Joint Committee or submitted to Bethlehem for employment.

Tesauro made a series of unsuccessful attempts beginning on July 1, 1963, to induce the Joint Committee to indenture the plaintiffs. Similarly, Bethlehem unsuccessfully renewed its request of the Joint Committee.

By letter on July 15, 1963, the Joint Committee again denied the request and offered to supply any additional apprentices required from among the other 150 applicants for apprenticeship training the Committee claimed to have in its files, none of whom was a Negro. Subsequently, many of these alleged applicants for apprenticeship training were found by the Committee to be unavailable for such training.

On or about July 19, 1963, Tesauro referred the whole matter to the President's Committee on Equal Job Opportunity which had been set up under the terms of Presidential Executive Order No. 10925. About two months later that Committee informed Tesauro in writing that it would take no direct action in the matter though its investigation confirmed the obvious violations of the executive order. Immediately thereupon, asserting that under color of law they were being denied rights guaranteed by the Constitution and laws of the United States and to enforce a Presidential Executive Order and relying on 28 U.S.C., §§1331, 1343(3), 1346(a)(2) and 1361; and 42 U.S.C. §§1981 and 1983, plaintiffs filed a complaint in the district court seeking federal judicial aid for their effort to be admitted to the ironworkers apprenticeship program and in the alternative ask-

ing the court to enjoin performance of the contract until they were so included and employed.

The court heard extensive testimony on the application for a preliminary injunction between September 27 and October 10, 1963, and on October 16, 1963, the court rendered an opinion (Appendix A) which the Court of Appeals rightly described as "able, extensive and comprehensive," 332 F. 2d 243, 246, finding that Negroes had been systematically excluded from the apprenticeship program and the Union, and concluded that two of plaintiffs, Todd and Hill, were entitled to a preliminary injunction as to all defendants save the Contractor. On November 8, 1963, *nunc pro tunc* as of October 16, 1963, as he had stated on that latter date would be done, the district court judge signed the decree of preliminary injunction which is attached hereto as Appendix G, pp. 65a to 67a.

The preliminary injunction required the Joint Committee to indenture Todd and Hill as apprentices and to tender them to Bethlehem for employment as apprentices; required the Union to admit them as apprenticeship members and Bethlehem to employ them; required the Chicago Board of Education to admit them to its apprenticeship classes; and required the Regional Director of the Department of Labor to use the full facilities of his office to assure that there would be no further discrimination in the apprenticeship program on account of race.

Counsel for the Union and the Joint Committee advised the court of their intention to appeal and the court stayed the effect of the decree pending that appeal. Timely notices of appeal were filed on behalf of the Joint Committee, the Union and Bethlehem but no appeal was filed by any other defendant.

On or about October 25, 1963, Bethlehem notified the district court that it had completed work on its sub-contract on or about October 23, 1964, after the effective date of the decree and prior to its notice of appeal being filed.

After the record in the district court had been filed with the Court of Appeals for the Seventh Circuit, but prior to any consideration of the appeal on its merits, the defendants-appellants moved to remand the cause to the district court with directions to that court to dismiss the cause as moot. On consideration of that motion the Court of Appeals for the Seventh Circuit vacated the judgment below and ordered the cause remanded to the district court with instructions to dismiss the complaint as to all the defendants as moot. This petition for certiorari seeks review of that order of the Court of Appeals for the Seventh Circuit which has been stayed by that court pending disposition of this petition.

## REASONS FOR GRANTING THE WRIT AND ARGUMENT AMPLIFYING SAME.

**The Court of Appeals decision is in conflict with the applicable decisions of this Court and should be reviewed and reversed by this Court.**

The Court of Appeals decided that this case has become moot because it was of the opinion that, 332 F. 2d 243, 247:

> "The subject matter of the litigation is no longer an actual controversy. The time for determination of the questions involved in this action has passed. No relief within the scope of the complaint could now be granted."

Thus the court below simultaneously concluded that there was no longer any actual controversy and that no judicial relief could now be granted. As authority for those conclusions the court below cited only one of its own prior decisions, *Johnson-Kennedy Radio Corp.* v. *Chicago Bears Football Club* (C.A. 7th, 1938), and a prior decision of this Court, *Amalgamated Association, etc.* v. *Wisconsin Employment Relations Board*, 340 U.S. 416 (1951).

Both of these cases are readily distinguishable from the case at bar. Neither involved any consideration of the availability of effective judicial remedy. In both, the original controversy had abated because of the passage of time.

In *Johnson-Kennedy Radio Corp.* v. *Chicago Bears Football Club, Inc., supra,* plaintiff sought to protect its exclusive contract to broadcast the 1936 "home" football games of the Chicago Cardinals Football Club, usually played in Comiskey Park, by seeking to restrain defend-

ants from broadcasting the account of a Cardinals-Bears game scheduled for November 29, 1936, at Wrigley Field, the Bears home field. A few days before the game the court issued a preliminary injunction so restraining the defendants and not until after the game had been played did the defendants answer the complaint. Nearly a year later a permanent injunction to the same effect was entered. On appeal the Court found no controversy then existing and *dismissed the appeal*. The court pointed out, 97 F. 2d 223, 225:

> "It will thus be seen that the essential question presented by the bill on its merits was as to which team, the Bears or the Cardinals had the exclusive rights in the broadcast of the football games (sic) to be played by such teams at Wrigley Field on November 29, 1936.
>
> * * * * *
>
> "The subject matter of the litigation has passed into history. We are unable to conceive of any reason why this court should decide a controversy, the determination of which could serve no beneficial purpose of any of the parties. The question has become moot and under such circumstances the authorities are numerous that we should dismiss the appeal."

In *Amalgamated Association, etc.* v. *Wisconsin Employment Relations Board*, supra, this Court was asked to review an affirmance of an arbitration award by the Wisconsin Supreme Court. By the terms of the Wisconsin statute pursuant to which the award had been made, it continued effective for only one year from its effective date unless earlier terminated by agreement of the parties. This Court ruled, 340 U.S. 416, 418:

> "We are informed that this award was superseded by agreement, and, in any event, the one year period has elapsed. There being no subject matter upon which

the judgment of this court can operate, the cause is moot."

The instant case is in sharp contrast to these cases. The Joint Committee continues to operate an apprenticeship program in conjunction with public officials and with public funds and facilities. The Chicago School Board continues to provide apprenticeship training at the Washburne Trade School. But the Joint Committee has not indentured plaintiffs. The racial discrimination which the district court found continues down to this present moment. Equally important, federal funds continue to be expended on construction work in the Chicago area and elsewhere with Negroes denied employment as ironworkers and training as apprentices in connection with such construction all in violation of the Constitution of the United States, the statutes and Presidential executive order.

Erroneously, the court below found that it had before it "merely a temporary injunction applicable only to the specific contract project to which it is addressed." 332 F. 2d 243, 247. The injunction itself, however, makes it clear that the district court's requirement of admission of the plaintiffs to the apprenticeship program was not so limited a remedy in light of the facts. Indenture of the plaintiffs and their employment by Bethlehem on the federal courthouse project in compliance with the decree would have been simply the start of their apprenticeship training which under the terms of the program would have lasted for three years. When their employment by Bethlehem ended, if it did, the Joint Committee would have found them other employment as they have done successfully for other apprentices. Even if the plaintiffs had been indentured and employed by Bethlehem when it

*began* performance of its subcontract, their apprenticeship would not have been terminated upon the completion of the ironwork on the federal courthouse. It necessarily follows then that the actual controversy concerning their exclusion from the apprenticeship program has not been shown to have been resolved and a continuing effective judicial remedy was provided by the district court.

The court below confused the relief requested in the complaint with the controversy actually involved in this case as demonstrated by the evidence heard and considered by the district court. This is not surprising since the Court of Appeals never considered this case on its merits. It is true that the plaintiffs in the complaint requested that the court order that they be hired on the federal courthouse as apprentices, or that, in the alternative, expenditures of federal funds on that project be enjoined. After hearing the evidence in support of the application for preliminary injunction, however, the district court, exercising its undoubted discretion as to the remedy to be provided, ordered that the plaintiffs be indentured as apprentices, that they be admitted to the Union as apprentices, that Bethlehem hire them as apprentices, that the Chicago School Board admit them to apprenticeship classes, and that the U. S. Department of Labor police the arrangement to see that there was no further racial discrimination in the apprenticeship program. What the court below has done is to seize upon an apparent present impossibility of compliance with the precise terms of the decree by *one* of the parties to the litigation, Bethlehem, to seek to justify the court's ignoring the actual controversy between the parties and the class they represent on the one hand, and the Union and the public officials on the other. This, despite the fact

that there is not even a suggestion, much less a showing, that the judicial remedy cannot be effective as to these other defendants. Indeed, since Bethlehem is still in business the remedy conceivably can be made effective as to it on some other job!

Prior decisions of this Court demonstrate that the fortuitous circumstance of the completion of Bethlehem's sub-contract in connection with the construction of the federal courthouse cannot properly be given the legal effect that the court below gave it. At the very same term in which this Court decided *Amalgamated Association, etc.* v. *Wisconsin Employment Relations Board, supra,* this Court also decided *Local 47, etc.* v. *NLRB,* 341 U.S. 707 (1951). In that case, a flooring sub-contractor complained to the NLRB that he was the victim of an unfair labor practice in that a strike of union carpenters working for the general contractor on a construction job had been called to compel the complainant to cease the use of non-union labor in carrying out its sub-contract. The Board found that continuance of the strike became unlawful because a statute specifically prohibiting such strikes became effective during the pendency of the strike. This Court agreed.

Most important here, however, was this Court's conclusion with respect to the question of mootness raised in that case. This Court said, 341 U.S. 707, 715:

> "This case has not been rendered moot by the completion of the renovation project. The complaint was against petitioners' use of secondary pressure upon Watson's in a manner proscribed by the statute. The use of such pressure on this renovation project was merely a sample of what might be repeated elsewhere if not prohibited. *The underlying dispute between peti-*

*tioners and Watson's has not been shown to have been resolved.*" (Emphasis supplied.)

This Court's observations in that case are equally applicable here. The underlying dispute between petitioners and these defendants has not been shown to have been resolved and petitioners continue to be the victims of the defendants' unlawful conduct.

The decision of this Court just cited followed earlier decisions to the same effect. In fact, the decision of the court below in the instant case is in conflict with a long line of prior decisions of this Court. For example, in *Federal Trade Commission* v. *Goodyear Rubber Co.*, 304 U.S. 257 (1938), this Court had before it, as in this case, a decision of a court of appeals based on the conclusion of that court that the matter before it had become moot. In that case the FTC had found Goodyear to be guilty of a violation of the Clayton Act in selling merchandise at discriminatory prices. After the FTC decision, but prior to the hearing on Goodyear's petition to the court of appeals for review, Congress amended the section of the Clayton Act involved. Goodyear thereupon informed the court of appeals that in light of the statutory amendment it had terminated the arrangement found by the FTC to be discriminatory. Because it was of the opinion that this abated the controversy between the parties as to the illegal character of Goodyear's former practices, the court of appeals concluded that the case had become moot and, without considering the merits, set aside the order of the Commission and remanded the cause to the FTC expressing no opinion as to whether the FTC could file a supplemental complaint under the statute as amended. Both the Commission and Goodyear, for different reasons, asked that the case be remanded to the court

of appeals with directions to determine it on the merits. This Court did so, pointing out, 304 U.S. 257, 260:

> "Discontinuance of the practice which the Commission found to constitute a violation of the Act did not render the controversy moot. [Cases cited omitted.] The Commission, reciting its findings and the conclusion that respondent had violated the act, required respondent to cease and desist from the particular discriminations which the order described. That is a continuing order. Its efficacy, if valid, was not affected by the subsequent passage or the provisions of the amendatory Act. As a continuing order, the Commission may take proceedings for its enforcement if it is disobeyed. But under the statute respondent was entitled to seek review of the order and to have it set aside if found to be invalid. The question which both parties sought to have the Circuit Court of Appeals decide was whether respondent's conduct was a violation of the original statute. Upon the conclusion that it was such a violation, the Commission based its order. Neither the transactions subsequent to that order nor the passage of the amendatory Act deprived the respondent of its right to challenge the order and to have its validity determined or the Commission of its right to have its order maintained if validly made.
>
> "The decree of the Circuit Court of Appeals is reversed and the cause is remanded to that court for a determination on the merits."

The decisions relied upon by this Court in the *Goodyear* case make it clear that it was never intended that parties should be denied judicial relief where an actual controversy persists as the court below would do. It is equally clear that petitioners' right to a remedy cannot be made to hang on whether respondents concur, as they did in the *Goodyear* case, that the Court of Appeals should consider the matter on the merits.

At least as early as its decision in *California* v. *San Pablo & T.R. Co.*, 149 U.S. 308, 314 (1893), this Court pointed out the basis for the "mootness" limitation on judicial action when it said:

> "The duties of this court, as of every judicial tribunal, is limited to determining the rights of persons or property which are actually controverted in the particular case before it."

It is clear that the reason for this rule is that by the Constitution of the United States the federal judicial power is limited to decisions of actual cases and controversies between adverse interests with respect to which the court's judgment will be effective. See Stern & Gressman, *Supreme Court Practice*, Ch. 16, p. 434 (3d Ed. BNA, 1962).

It is clear that the controversy between the parties in the instant case persists. It is equally clear that federal judicial power is not so limited that it cannot provide an effective remedy for these petitioners.

Ironically, the decision of the court below is not only in conflict with prior decisions of this Court it is even in conflict with a prior decision of the court below. In *Ramsberg* v. *American Investment Co. of Illinois*, 231 F. 2d 333 (1956), stockholders sought to restrain a corporate merger but the district court refused a preliminary injunction. The merger was completed prior to decision on appeal. Nevertheless the court refused to dismiss the appeal as moot relying on prior decisions of this Court which were ignored in the instant case.

The doctrine of mootness has certainly never been intended by this Court to deprive persons of judicial remedy in an appropriate case. In this case the district court

provided a remedy but the Court of Appeals, without considering the matter on the merits, and ignoring the terms of the remedy provided, has acted to deprive the petitioners of the badly needed judicial aid to protect their constitutional rights.

Because of this and because the decision of the court below is inconsistent with the applicable decisions of this Court a writ of certiorari to review and reverse the decision below is required.

## CONCLUSION.

For the foregoing reasons petitioners respectfully urge this Court to grant its writ of certiorari to review and reverse the decision of the court below.

Respectfully submitted,

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# APPENDIX

# APPENDIX A

IN THE UNITED STATES DISTRICT COURT
Northern District Of Illinois
Eastern Division

* * (Caption No. 63 C 1739) * *

October 16, 1963

## OPINION OF THE DISTRICT COURT

Negroes brought class action against union, union offi-ers, apprenticeship committee of union, contractor, sub-ontractor, regional administrator of the General Services Administration, the regional director of the Bureau of Apprenticeship and Training, and the Board of Education f the City of Chicago to enjoin discrimination against egroes with respect to job opportunities in iron construc-ion work. The District Court, Campbell, Chief Judge, held hat where the federal government through two of its gencies and the state through one of its agencies made possible for the union and its apprenticeship committee o realize and perpetuate discriminatory practices against egroes, union and apprenticeship committee would be or-ered to cease and desist from further discrimination.

Judgment in accordance with opinion.

CONTRACTS [187(1)]
UNITED STATES [70(5)]

Negroes, who sought work with subcontractor in con-truction of United States courthouse and office building eing constructed pursuant to contract between General ervices Administration and contractor and subcontractor,

were not third-party beneficiaries of contract and subcontract which required contractor and subcontractor not to discriminate on basis of race, religion, or ethnic background in hiring of their employees.

2. Courts [282.2(11)]

Federal District Court had jurisdiction of class action by negroes against union, officers of union, apprenticeship committee of union, contractor, subcontractor, regional administrator of General Services Administration which had contracted with contractor for construction of United States courthouse and office building, regional director of Bureau of Apprenticeship and Training, and Board of Education of Chicago to enjoin discriminatory denial of job opportunities to negroes in iron construction work in violation of federal Constitution. Fed. Rules Civ. Proc. rule 23(a)(1), 28 U.S.C.A.; U.S.C.A. Const. Amends. 5, 14; 28 U.S.C.A. §§ 1331, 1343(3), 1346(a)(2), 1361; 42 U.S.C.A. §§ 1981, 1983.

3. Federal Civil Procedure [217]

Men, whose names appeared on apprenticeship list of union ahead of negroes, were not indispensable and necessary parties in class action by negroes to enjoin discriminatory denial of job opportunities in iron construction work in violation of federal Constitution. Fed. Rules Civ. Proc. rule 23(a) (1), 28 U.S.C.A.; U.S.C.A. Const. Amends. 5, 14; 28 U.S.C.A. §§ 1331, 1343(3), 1346(a) (2), 1361; 42 U.S.C.A. §§ 1981, 1983.

4. Action [2]

Where there is a right there should be a remedy.

*(Appendix A)*

5. Constitutional Law [215]

State or individual acting under color of state authority cannot unreasonably discriminate against race, religious group, or ethnic group in granting of job opportunities. U.S.C.A. Const. Amends. 5, 14.

6. Constitutional Law [213]

Actions of all governmental agencies, be they legislative, executive, or judicial, are attributable to public body and can be cause of constitutional violations.

7. Constitutional Law [215, 275(1)]

Racial discriminatory job practices of union, absent facts of public body consent, assistance, or support, do not violate due process and equal protection clauses of the federal Constitution. U.S.C.A. Const. Amends. 5, 14.

8. Constitutional Law [215]

Private citizen or organization, to extent that their activities in discriminating against negroes with respect to job opportunities remain entirely private and unrelated and non-dependent on sovereign, cannot be charged with denial of equal protection of law. U.S.C.A. Const. Amend. 14.

9. Constitutional Law [215]

Where federal government through two of its agencies and state through one of its agencies made it possible for union and its joint apprenticeship committee to perpetuate their practices of discriminating against negroes with respect to job opportunities in iron construction work, union, union committee, and union officers would be ordered to cease and desist from further discrimination against negroes. U.S.C.A. Const. Amends. 5, 14.

*(Appendix A)*

William R. Ming, Jr., Harold McDermid, Chicago, Ill., for plaintiffs.

James P. O'Brien, U. S. Atty., by John P. Lulinski and John J. Crowley, Chicago, Ill., for defendant Dominic Tesauro.

John J. Faissler and Bernard J. Nussbaum, Chicago, Ill., for defendant Pasehen Contractors, Inc.

Paul R. Conaghan, Chicago, Ill., and G. W. Thursby, for defendant Bethlehem Steel Co.

Bernard M. Mamet and Sinclair Kossoff, Chicago, Ill., for defendant Local No. 1.

Jerome A. Frazel, Jr., Robert Kelling, Chicago, Ill., for defendant Joint Apprenticeship Committee.

John T. Mehigan, Thomas R. Tyrrell, Chicago, Ill., for Board of Education.

CAMPBELL, Chief Judge.

The instant action, which might best be described as a suit alleging the discriminatory denial of job opportunities in violation of the United States Constitution, was first presented on a motion for a temporary restraining order or in the alternative for a preliminary injunction.

By way of chronology I should here record that prior to accepting the task of deciding this case on its merits I attempted, unsuccessfully, in a pre-trial conference to have the attorneys for the respective parties reach an amicable settlement.

When settlement showed itself to be impossible, I immediately heard oral argument on the all important issue of jurisdiction. The excellent oral arguments of all counsel, buttressed by their equally fine supporting briefs, convinced me, first, of the unusual importance and significance

of this case from both a legal and a sociological perspective; second, of an apparent conflict between the equities of the case and what law there is relative to the issues; and thirdly, of the fact that for the most part this complaint, taken as a whole, presented a case of first impression, which should proceed at this time without further delay to do justice to all parties concerned.

In order better to study the issues, I required the additional benefit of knowledge of the facts underlying the complaint, facts which it was apparent defendants' counsel themselves did not agree upon in their oral arguments on the jurisdictional issue. I, therefore, denied the motions to dismiss without prejudice to their being renewed at the close of the evidence on the motion for a preliminary injunction.

I thereby reserved the jurisdictional issue with the factual issue until now.

After receiving evidence on the facts involved, hearing the most eloquent arguments of all counsel, and re-reading the excellent briefs previously submitted I now make the following findings of fact and conclusions of law.

The named plaintiffs, three young negroes, bring this case as a class action on behalf of themselves and all other negroes who are similarly situated. The defendants are identified as follows:

1. Joint Apprenticeship Committee of the Steel Workers of Chicago and International Association of Bridge, Structural and Ornamental Iron Workers Local Union No. 1, and Its Named Officers and Officials named in the complaint, which will be hereinafter referred to as the Joint Committee, or as the Committee.

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2. Iron Workers Bridge and Structural Union, Local No. 1, and Its Officers and Officials named in the complaint, which entity will hereinafter be referred to as the Union.
3. Paschen Contractors, Inc., a Delaware Corporation, and Peter Kiewit Sons Co., a Nebraska Corp., which will be hereinafter referred to jointly as The Contractor.
4. Bethlehem Steel Company, a Delaware corporation, which will hereinafter be referred to as Bethlehem.
5. Dominic Tesauro, Regional Administrator, General Services Administration, who will hereinafter be referred to either as Tesauro or the G.S.A.
6. Alvin A. Dost, Regional Director, Bureau of Apprenticeship and Training, U. S. Department of Labor, which hereinafter will be referred to as Dost or the Bureau.
7. Board of Education, City of Chicago, which will hereinafter be referred to as the Board of Education.

There is little dispute as to the facts, although there seems to be a grave question as to what findings they may justify. Thus, for present purposes I will merely outline the facts to the extent necessary to permit me to recite my findings thereon.

In October, 1962, GSA entered into a contract for the construction of a United States Courthouse and Office Building structure herein the City of Chicago with the defendant Contractor, who in turn sub-contracted with the defendant Bethlehem as to the steel work. These contracts included provisions which in effect require the Contractor and Sub-Contractor not to discriminate on the

basis of race, religion or ethnic background in the hiring of their employees. The contracts also specifically include by reference the terms of Presidential Order No. 10925 on Equal Employment Opportunities.

The defendant Union is the sole supplier of iron workers to Bethlehem on the instant job. Bethlehem by virtue of its collective bargaining contract must hire only those certified to it by the Union.

This Union has never had a negro among its membership. Moreover, the Joint Committee which supplies this Union with its new members through an apprenticeship program has never, until July of 1963, had a negro application on file. The Joint Committee is the sole supplier of apprentices to the Union.

To relieve what on its face appeared to be a patent policy of discrimination an initial attempt was made by government agencies to locate negro journeymen who were Union members. It is noted that this search was not confined to this area, and in fact, this search failed to produce so much as one negro within the ranks of the defendant Union. Having so failed, some six negro welders who had experience working on steel were suggested to the Union and/or to Bethlehem in the hope that some of them might be acceptable journeymen. These men were all found to be incompetent prospective journeymen, either on the basis of their age or lack of experience.

Next, the plaintiffs, the aforesaid three young negroes, after being tested as to aptitude, potential ability and suitability were encouraged by the same government officials to seek employment on this federal job as apprentice iron workers. In the latter part of June, 1963, they were interviewed by representatives of Bethlehem who found two

of the three, Todd and Hill, to be qualified. The evidence brought forth the fact that Bethlehem was and is of the belief that one of the specifically named plaintiffs, Michael Cochran, would not be a satisfactory employee. I need not and will not go into the reasons and merits prompting Bethlehem's position with reference to Cochran beyond concluding, which I do, that Bethlehem's decision that it did not want Cochran was not an act motivated or principled upon reasons of racial discrimination. Bethlehem did, however, express a willingness to hire Todd and Hill as apprentice iron workers subject to their being properly indentured and presented by the Union. This fact was made known by Bethlehem to the Union and to the Joint Committee. All three plaintiffs did, also during the latter part of June, 1963, fill out apprenticeship training applications with the Joint Committee. None of the three were or have been indentured and/or submitted to Bethlehem for employment.

To become a member of the Union through the apprenticeship program an applicant must first be permitted to fill out an application. That application must then be accepted by the Joint Committee, said acceptance coming only after the applicant has been examined by the Committee.

Conflict inheres in the testimony, the documentary evidence and the representations of counsel as to the method by which applicants are selected for indenture certification. Chronology of application is probably a criteria, assuming the Joint Committee desires it to be. But as a practical matter, I find that selection is wholly within the arbitrary discretion of the Joint Committee. In any event, I find that the actual operation of the instant program considered

in light of its results discriminates against negroes, more specifically against the rights of negroes to learn and earn a living in, the particular trade involved. I find that whatever apprenticeship list the Joint Committee does have represents a history of discrimination against negroes.

The defendant Contractor has had in its employ on the Federal Courthouse Building some 35 to 40% negro employees. All other unions working on the structure have negroes among their members, and who are actively employed. Contrastingly, the Union here has presently some 2,300 members none of whom are negro. Since 1952, there have been approximately 800 apprenticeships in the instant Joint Committee program, some 400 of which have graduated to become journeymen. None of these 800 were or are negroes. Bethlehem Steel at one time during peak employment, employed 114 journeymen iron workers on this government project and none were negroes.

Based upon rational and reasonable inferences I find that either negroes were refused application blanks by the Joint Committee, or if permitted to file such applications they were never acted upon. I find that the negro community as such knew of this policy of the Joint Committee and the Union and that because of the inherent and patent futility of such action sent few applicants in recent years to the Joint Committee or the Union.

To make my position clear, I should observe that the mere absence of members of the negro race on the roles of this specific Union or on the roles on that Union's apprenticeship list would not in and of itself be proof of discriminatory membership policies.

However, the evidence before me, including but not limited to the history and general polices of the Union and

the Joint Committee, manifest a definite policy and history of discrimination against those of the negro race. These facts present a clear picture not of racial segregation but of racial exclusion. The above cited facts and figures evidence a systematic policy on the part of the Union and the Joint Committee to exclude negroes solely on the basis of their race. *Yick Wo* v. *Hopkins*, 118 U.S. 356, 6 S. Ct. 1064, 30 L. Ed. 220.

It is obvious from a reading of the GSA correspondence in evidence and from the testimony of Mr. Tesauro that the GSA was not satisfied that the Joint Committee's selection of apprenticeships for indenturing in the past had been based strictly on a chronological membership list basis. Nor was the GSA satisfied that the Union's membership policy had been non-discriminatory. It is equally obvious that the GSA believed the Joint Committee to have discriminated against negro applicants and to be discriminating against these specific plaintiff negro applicants.

I think it also fair to state that GSA was of the belief that the Union in the past had discriminated against negroes relative to membership. On the basis of the same GSA files and the additional evidence presented to me, I find to be a fact the above suspicions and beliefs of the GSA. I find that the Joint Committee and the Union discriminated against negroes who sought admittance to the said Union.

The Joint Committee's apprenticeship program operates under the approval, certification, and with the continued assistance of the Bureau. The Joint Committee's apprenticeship program is presently registered by the Bureau, although no application list has ever been submitted to the Bureau. The Bureau has never sought to dis-certify the

Joint Committee's program, rather, on the other hand, the Bureau has on several occasions sent to the Joint Committee letters of commendation.

A full program of academic instruction is and has for some time been conducted as part of the apprenticeship program. Facilities and equipment of the Board of Education are used for this academic instruction. The three hour classes, which convene two nights per week, are taught by teachers employed and paid for by the Board of Education. Admission to these classes can come only upon approval by the Joint Committee. Of the 56 students presently enrolled, none are negroes.

[1] To reduce somewhat the necessary scope of my legal comments I wish here to indicate my own belief in the non-applicability and legal insufficiency of any contractual 3rd party beneficiary theory in relation to the instant action. Suffice it to say, I am of the opinion and legally conclude that the plaintiffs, either singularly or as a class, are not true "donee" or "creditor" beneficiaries, but rather, are at best "incidental" beneficiaries and as such have no contractual rights against any of the defendants. Even assuming for the sake of argument the existence of such rights they would at best be limited against those in privity, which in light of my foregoing factual findings would render such an action worthless. In light of my remarks on this subject during the trial, I doubt that this ruling comes as any great surprise to counsel. Those legal arguments presented by the various defendants, solely addressed to this *ex contractu* theory of recovery, therefore, will not be further discussed.

Now, as to plaintiffs' more general theory, wherein they allege that their rights as a class have been consti-

tutionally violated, I find much merit. Accordingly, I hereby once again deny, and this time on the merits, all pending motions to dismiss the instant complaint for want of jurisdiction and all motions to dismiss for failure to state a claim upon which relief can be granted.

[2] I find this action to be properly within the wording of Rule 23, subsection (a) (1), of the Federal Rules of Civil Procedure, as one involving a joint and common right; the right of negroes as a class to claim guarantees afforded them by the 5th and 14th Amendments to the Constitution of the United States. I conclude as a matter of law that the jurisdiction of this Court in the instant action can be and is properly invoked under Title 28 United States Code, Sections 1331, 1343, Sub-section (3), 1346, Sub-section (a) (2) and 1361, as well as Title 42, Sections 1981 and 1983.

I shall here briefly consider some of the legal arguments interposed by various defendants and in so doing indicate the reason or reasons why I have not seen fit to adopt them in the present case.

One of the strongest arguments, one which directly challenges my right even to consider this case in the first instant, is that presented by the United States Attorney on behalf of defendants Tesauro and Dost. The argument contends that this court lacks jurisdiction on the instant complaint inasmuch as the United States Attorney suggests, this action is really against the United States and in effect seeks an injunction against it. I am not unmindful of the fundamental pronouncements relative to the nature and extent of the law of sovereign immunity by the Supreme Court relative to injunction matters against the United States. *Larson* v. *Domestic and Foreign Commerce Corp.*,

337 U.S. 682, 69 S. Ct. 1457, 93 L. Ed. 1628, in 1949 and more recently in *Malone* v. *Bowdoin*, 369 U.S. 643, 647, 82 S. Ct. 980, 8 L. Ed. 2d 168.

In the words of the Supreme Court, "* * * the crucial question is whether the relief sought in a suit nominally addressed to the officer is relief against the sovereign". (*Larson*, page 687, of 337 U.S., page 1460 of 69 S. Ct., 93 L. Ed. 1628). However, the same Supreme Court has far from interpreted its above quoted language in a totally literal sense. Without attempting here to examine its motivations, a study of the Court's decisions relative to this law of sovereign immunity would clearly indicate precedent upon which to rest the present action against both Tesauro, as Regional Administrator of the General Services Administration and Dost, as Regional Director of the Department of Labor's Bureau of Apprenticeship and Training. Although not directly salient to the present action, I cite *Vitarelli* v. *Seaton*, 359 U.S. 535, 79 S. Ct. 968, 3 L. Ed. 2d 1012, wherein the Court ordered the Secretary of the Interior to reinstate a discharged federal employee to his government position; and in *Bell* v. *Hood*, 327 U.S. 678, 66 S. Ct. 773, 90 L. Ed. 939 the Court apparently acknowledged the existence of jurisdiction in the federal courts over complaints alleging that federal employees violated individual constitutional rights. And in the more recent *Malone* decision cited above, the most recent pronouncement by the Court on the instant subject, the Court by no means indicated any present desire to totally truncate the possibility of such actions, for in *Malone* the Court in essence stated that one can sue a government agency if there is a constitutional violation in the present exercise of the agency's power. I also cite 3 Davis, Administrative Law

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Section 27.08. Moreover, as I indicated at the time this argument was orally presented to me, I did not then nor do I now intend to enjoin the United States of America.

As to the argument by the Union and the Joint Committee that they cannot be sued as an entity under Illinois Law, I need only cite Rule 17, subsection (b) (1) of the Federal Rules of Civil Procedure which I believe applies to both the Union and the Joint Committee. The Rule permits a suit against such an unincorporated association "* * * in its common name for the purpose of enforcing for or against it a substantive right existing under the Constitution or laws of the United States, * * *". Moreover, the complaint specifically makes parties those who clearly are the responsible officers of both the Union and the Joint Committee. There is little doubt in my mind but that those necessary to enable me to enter judgment are properly before the court as party defendants.

[3] I find unjustifiable and of little merit the Union's contention that plaintiffs have failed to join an indispensable and necessary party, namely the some 148 men (actually the evidence indicated this figure now to be closer to some 90 men) whose names the Union contends appeared and appear on the apprenticeship list ahead of those of the plaintiffs specifically named in the caption of the complaint. In the first place this contention is based upon what the evidence and my factual findings have proved to be an inaccurate assertion and assumption, namely, that the Joint Committee in fact maintains or maintained a chronological list from which prospective applicants were called in order of their application. (On October 3, in oral argument before the court, counsel for the Joint Committee unequivocally stated that the selection of

applicants for actual indenturing involved discretionary selection based upon several criteria. This statement was borne out by the evidence.) Moreover, even assuming the facts to be contrary to the evidence and my expressed findings, as the Union's counsel suggested them to be, these 148, or however many we may now have, individuals could not be said to have such an interest in this controversy that a complete decision would be unjust and impossible without them as parties. I am of the opinion that this suit is neither directly or indirectly against them; if they feel otherwise I should make it clear that I am not now nor would I in the future have any intention to preclude their joinder in this action.

Parenthetically, I might observe that I would, were the issue properly before me, find little merit to any argument seeking to assert the alleged rights of persons whose names appeared preferentially on lists which were in their entirety the result of a discriminatory practice. Once having come to the point of finding a history of discrimination, as I have done here, it would become imperative upon me sitting in Equity, to somehow off-set the effect of previous discrimination and not to protect its by-product. To this extent, and in this relation at this juncture I should observe that the anecdote of counsel for Bethlehem illustrating the extremes to which an Englishman would go, and apparently with impunity, to protect his queue rights, deserves comment.

Assuming that I could even partially accept the fact that one standing to the rear of a line should not, for fear of death, attempt to advance in the line ahead of others who preceded him, still I would now unanalogize the anecdote by interposing the additional fact, obvious

from the evidence in the instant case, that the person standing in the rear of the line is and was there because others would not permit him to advance to the line until it already had been formed.

Apparently as an afterthought, since it was not mentioned at the time the initial motions to dismiss were argued, counsel for the Union in his final argument insisted that jurisdiction over the instant complaint has been pre-empted by the National Labor Relations Board under Sections 157 and 158, sub-section (b) (2) of Title 29 of the United States Code.

In support of this argument counsel cited cases which he inferred to the court were on point. Not only have I, upon a reading of the cases cited, found them, in my opinion, to be inapposite, but if any thoughts relative to the instant cases are to be distilled therefrom it is that the method herein employed by the plaintiffs is the only one available to them.

Indeed, counsel's legal argument can be dispelled without even referring to the cases, which he cites. Section 157 concerns itself with the rights of employees to form, join and assist labor unions and bargain collectively with their employers. Needless to say, this section is addressed to employers of employees and has no factual relationship to the instant complaint. Section 158 generally concerns itself with unfair labor practices. Sub-section (b) (1) provides:

> "(b) It shall be an unfair labor practice for a labor organization or its agents—
>
> "(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 157 of this title: Provided, That this paragraph shall not im-

pair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; or (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances;"

This sub-section addresses itself only to unfair labor practices by a Union—unfair labor practices against employees. The statute in no way proscribes the discriminatory conduct alleged and proved in this case. For that matter I might gratuitously comment that if, as suggested by the Union's attorney, this action were initiated before the National Labor Relations Board, the same Union and possibly through the same attorney would undoubtedly be the first to defend on the ground that the complainants were not employees or members of the Union and as such were entitled to no rights under the Act which it cites here. It is obvious to me that a union's responsibility under this Act does not extend beyond the membership of its own union and the non-union employees who are members of the same bargaining unit. The statute expressly exempts from its provisions, even assuming *arguendo* its applicability to the non-employee plaintiffs in the instant case, the right of a union to determine its membership. It is that which is specifically so exempted from that act which is the issue here.

In this regard I note the language and the holding of the Supreme Court in *Brotherhood of Railroad Trainman* v. *Howard*, 343 U.S. 768, 72 S. Ct. 1022, 96 L. Ed. 1283. The complaint there as here was brought against a union by non-members (but employees) alleged discrimination in the denial of job opportunities. The Court specifically

considered and expressly rejected the union's contention that it was protected by the Norris-LaGuardia Act. It is interesting to note that the Court considered and rejected still another argument by the union; that its actions were those of private parties and as such not subject to the constitutional proscriptions. The Court there did have before it what it held to be a statutory duty arising under the provisions of the Railway Labor Act (45 U.S.C. §151 et seq.) However, in justifying its action in enjoining continued discrimination by the union the Court cited two cases, one of which was *Shelley* v. *Kraemer*, 334 U.S. 1, 68 S. Ct. 836, 92 L. Ed. 1161. Notably, there was no such statute in *Shelley*.

At the onset of these proceedings I was somewhat impressed by statements made by plaintiffs' counsel in answer to the defendants' respective motions to dismiss. If plaintiffs' counsel will permit me the right to somewhat paraphrase, and I might add shorten, his comments, they were that taken as a whole the arguments of defendants' counsel seemed to "add up to" and agree that: the plaintiffs had some legal rights which were violated; that whatever these rights are they have something to do with the Government of the United States; however, the courts of the United States are the wrong place to bring an action seeking to redress the deprivation of these rights; and in any event, the wording of the present complaint shows it to be an improper vehicle upon which to proceed.

[4] One of the defendants' counsel in his closing argument summarized the action as being, "A good cause in a bad case." The above reasoning is not completely without legal support. However, I find justification in the

basic and fundamental axiom of equity *"Ubi Jus Ibi Remedium"*—where there is a right there should be a remedy.

Fortunately we have come a long way since Judge Ferguson found little merit to a demurrer filed to a criminal information by a defendant named Plessy who was convicted of violating a Louisiana statute providing for separate transportation accommodations. I refer to *Plessy* v. *Ferguson*, 163 U.S. 537, 16 S. Ct. 1138, 41 L. Ed. 256, decided in 1896.

[5] Since *Plessy* the Supreme Court has given a more literal and in my opinion a more just and equitable interpretation to the Equal Protection Clause contained in the 14th Amendment. That a state, or an individual, acting under color of state authority, cannot unreasonably discriminate aganist a race, religious or ethnic group, in the granting of job opportunities can no longer be questioned. Furthermore, the 5th Amendment's Due Process Clause, notwithstanding some argument and suggestions to the contrary by counsel in the instant case, has now unequivocally been determined by the Supreme Court to either by inference adopt literally or at the very least legally encompass the Equal Protection Clause of the 14th Amendment. I cite *Bolling* v. *Sharpe*, 347 U.S. 497, 74 S. Ct. 693, 98 L. Ed. 884. To hold otherwise would of necessity imply an anomalous circumstance which would in effect permit the Federal Government (which would include the District of Columbia) to violate rights made sacrosanct from similar invasions by the states. A most recent statement by the Supreme Court is most relevant not only legally but factually to the instant case. In *Colorado Anti-Discrimination Commission* v. *Continental*

*Air Lines*, 372 U.S. 714, at page 721, 83 S. Ct. 1022, at page 1025, 10 L. Ed. 2d 84 the Court stated:

> "But under our more recent decisions [in addition to *Bolling* v. *Sharpe* the Court cited *Brown* v. *Board of Education of Topeka*, 347 U.S. 483, 74 S. Ct. 686 (1954); *Bailey* v. *Patterson*, 369 U.S. 31, 82 S. Ct. 549, 7 L. Ed. 2d 512 (1962)] any state or federal law [says the Supreme Court] requiring applicants for any job to be turned away because of their color would be invalid under the Due Process Clause of the Fifth Amendment and the Due Process and Equal Protection Clauses of the Fourteenth Amendment."

It might well be argued, and indeed it has been, that on the basis of the evidence before me neither the Federal Government, through its agency defendants, nor the State of Illinois, through the Board of Education, actively violated the constitutional rights of the plaintiffs. There is in my mind little question and I have so found it to be a fact, that the Union and the Joint Committee invidiously discriminated against the plaintiffs. However, I am not unmindful that the 5th and 14th Amendment do not protect against merely private conduct. *U. S.* v. *Harris*, 106 U.S. 629, 1 S. Ct. 601, 27 L. Ed. 290 and *U. S.* v. *Cruikshank*, 92 U.S. 542, 23 L. Ed. 588.

This denial of "public body" action is not novel, and if in effect it is substantiated by the evidence, which in my opinion it was not in the instant case, it would state a defense to actions such as this. We must look to the relationship between the constitutional violator on the one hand and the government, be it federal or state, on the other. It should be remembered that public bodies may and of necessity do act through a variety of agencies.

[6] The actions of these agencies are none the less the actions of their creators. And that the actions of all

such agencies, be they legislative, executive or judicial, are attributable to the public body and can be the cause of constitutional violations cannot be questioned. *State of Virginia* v. *Rives*, 100 U.S. 313, 25 L. Ed. 667, *Brinkerhoff-Faris Trust & Savings Co.* v. *Hill*, 281 U.S. 673, 50 S. Ct. 451, 74 L. Ed. 1107.

The discrimination in the instant case could not have been accomplished without the aid and assistance of the three public agencies defendants. The character of the actions and conduct of these defendant agencies cannot be attenuated by the woefully repetitious argument that they did not directly and solely discriminate against the plaintiffs. It is obvious from the evidence that their actions are wholly inconsistent with the constitutional guarantees they are required to honor. I now legally conclude from the instant facts it is not only clearly established that such a relationship exists but in the language of the Supreme Court a relationship involving the Federal Government and the State, through their respective agencies, to a "significant extent". *Burton* v. *Wilmington Parking Authority*, 365 U.S. 715, 81 S. Ct. 856, 6 L. Ed. 2d 45.

These various relationships deserve comment. Although both government agencies, GSA and the Bureau, are related significantly to the discriminatory practices, their attitudes and reaction to the instant situation were not necessarily similar. On the one hand GSA through the defendant Tesauro acknowledged the existence of this undesirable situation, one which by continued erection of the Federal Courthouse structure it was unwillingly fostering and becoming an integral part of. The evidence clearly shows that Tesauro earnestly attempted to adopt and foster and eventually make a reality the policies

of the President of the United States set forth in his Executive Order No. 10925 on Equal Employment Opportunities, which was made a part of the contracts in the instant case. The tools which he, Tesauro, was given to accomplish this task proved glaringly insufficient. In this regard the evidence shows his having notified the President's Committee on Equal Employment of the discriminatory practices. At best his remedial power extended only to the contractor and sub-contractors and then only to a very limited degree. Needless to say he could not require them, or more specifically in this instance Bethlehem Steel, to hire non-union help. Such a suggestion would require Bethlehem to breach their collective bargaining contract with the Union. His suggestions, recommendations and indeed his accomplishments, blemished only by this Union and Joint Committee, constituted a realistic effort to compensate for past and to avoid future charges and incidents of discrimination. Action such as this by responsible government officials could do much to avoid many of the incidents reported all too frequently in the press these days. The defendant Union and the Joint Committee on the other hand have done much to stultify his work. All other unions and apprenticeship committees on this project have fully and unreservedly cooperated with Mr. T[illegible]aro. The halls of justice which they are now helping to build will serve as a constant reminder to others that our Constitutional expressions of equality are more than mere abstract terms. The defendant Union and Joint Committee by their actions have in my opinion attempted to make a mockery out of the public spirit of these other unions who yielded to the efforts of Tesauro and others like him. Notably, this is the only Union and

Joint Committee not to adhere to the policies set out in the Presidential Executive Order. They deliberately disobeyed the Presidential Order. True, the law imposes no criminal penalty or sanction for such action. However, sitting as a court of Equity I cannot help but note and disapprove the smug policy of this one Union of accepting the sweet and avoiding the bitter. In accepting work on this contract, they together with all other employees, accepted the benefits to be derived therefrom, however, they alone refused to comply with what they thought to be the repugnant part of the Presidential Order.

Basic Equity and simple justice to the unions which have so laudably cooperated compels mandatory action against this Union which has so selfishly and stubbornly refused even nominal or token cooperation.

My comments and observations on the activities and conduct of the defendant Tesauro are offered also to distinguish him and his agency's actions from those of the other Federal government agency defendant, as well as the nature and the background of some of the actions of the Union and its Joint Committee.

I have by the last few paragraphs intended to some extent to praise defendant Tesauro and the GSA. Unfortunately, I cannot say the same for the defendant Dost, who in my opinion sat idly by and through his course of non-action fed and encouraged the discriminators. With the obvious exception of The Department of Labor officers Cicero and Harris, who by their actions deserve praise similar to that bestowed on Tesauro, the evidence before me indicates at best disconcern by the Bureau as to this situation and situations similar to it. The Bureau was also the recipient of equally non-discriminatory plati-

tudes from no less a personage than the Secretary of Labor. However, the Bureau files, that is, those which they could locate, and the testimony of Dost indicate an overall apathy to the problem, in my opinion. Ironically enough the remedial tools at its hands were and are far superior to those available to Tesauro. Could not the Joint Committee's recognition have been retracted by the Bureau? Could not further assistance to the Joint Committee and the Union have been denied, by the Bureau?

In any event and notwithstanding what appears to me to be different motives and reaction to the situation, I must and do find from the evidence that both Federal agencies directly and significantly made possible and aided in the perpetuation of the Joint Committee and Unions' discriminatory policies. The GSA by making it possible for the Union and Joint Committee to function on the Government Building project, the violent alternative of course, unfortunately would be to stop construction; and the Bureau by extending direct aid and assistance and recognition and in effect giving its blessing to the practices of the Joint Committee.

So also the Chicago Board of Education, notwithstanding its motivations and actual desires, neither of which are manifest by the evidence in the instant case but which I certainly presume to be laudable and public spirited. Nevertheless, the defendant, the Board of Education, did make available its facilities, its equipment and its teachers (who additionally I should observe were selected with the aid of the Joint Committee) to the furtherance of what it knew or should have known was an invidiously discriminatory scheme.

The Board of Education acted under color of sate authority and its actions were and are "involved to a signifi-

cant extent" with the overall discriminatory plan. Although possibly not directly related from a point of legal significance, I cannot help but note the extent to which our Supreme Court has gone to protect the Constitutional guarantee of freedom of religion from school board action. In *People of the State of Illinois ex rel. McCollum* v. *Board of Education of School District No. 71*, Champaign County, Illinois, reported at 333 U.S. 203, 68 S. Ct. 461, 92 L. Ed. 649, the Court declared unconstitutional the use of school buildings and school time for the utilization of religious education. Analogizing the facts in *McCollum* with those in the instant case for the purpose of making equity evaluation one cannot help but note the preponderance of the equities in the case now before me. For here the utilization of a tax supported system is in aid of racial discrimination, not merely the teaching of religious tenets which are in and of themselves far from being morally wrong.

[7] I reiterate, discriminatory practices of the Union and the Joint Committee absent the facts of public body consent, assistance or support would not of themselves violate the 5th or 14th Amendments. The privilege of membership in a labor union is of no concern in and of itself to the courts. Moreover, membership in a union in and of itself cannot properly be made a subject of concern of this court unless as we have here, it is an essential requirement and qualification to the plaintiffs realizing rights owed them by the Federal and State governments.

[8] The Union and the Joint Committee are, on the basis of the facts here, an integral part of a Federal and State project. A private citizen or organization, to the extent that their activities remain entirely private and unrelated and non-dependant upon the sovereign, cannot be charged wtih denial of equal protection of the law. How-

ever, we have more. The Federal government through two of its agencies and the State through one of its agencies, is at the very least passively assisting, aiding and making it possible for the defendant Union and Joint Committee to realize and perpetuate their discriminatory practices. The defendant agencies in practice and in effect are permitting the Union and Joint Committee to practice racial discrimination and by so doing if not directly at least indirectly are denying plaintiffs their constitutional rights.

If I might extend and apply to the instant facts some of the language and reasoning of the Supreme Court I think it fair to state, that in the wording of *Smith* v. *Allright*, 321 U.S. 649, 64 S. Ct. 757, 88 L. Ed. 987, being indentured into the Union is an "essential qualification" which must be met by one seeking employment as an iron worker on the Federal Courthouse Building. The landmark, Civil Rights Cases 109 U.S. 3, 3 S. Ct. 18, 27 L. Ed. 835, holding that the actions of individuals, as individuals, unsupported by governmental authority (the Court was there concerned with State action) cannot constitute a violation of one's constitutional rights, used the following language: " * * * if not sanctioned in some way by the State, or done under State authority * * *". I find on the evidence before me that the three governmental agency defendants have here sanctioned the conduct of the Union and the Joint Committee, within the language of that opinion.

It is clear on the basis of the evidence and the law of the case that the defendant Contractor, Paschen-Kiewit, has not been guilty of any act or acts of discriminatory conduct against either the named plaintiffs or for that matter any un-named members of the plaintiffs' class. Accordingly, I now award judgment to and dismiss the defendant Contractor.

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It is equally clear on the basis of the evidence and the law of the case that the defendant Bethlehem has not been guilty of any act or acts of discriminatory conduct against either the named plaintiffs or for that matter any unnamed members of the plaintiffs' class. However, for the purpose of and only for the purpose of rendering a complete and total decree I cannot dismiss but must retain jurisdiction over Bethlehem Steel.

In accordance with the views here expressed I must and do of necessity retain jurisdiction over the three public agency defendants, GSA, the Bureau and the Board of Education.

[9] Accordingly, and as to the remaining defendants not heretofore dismissed, I find the issues for the plaintiffs and I hereby order adjudged and decreed that the defendants Joint Apprenticeship Committee of the Steel Workers of Chicago and International Association of Bridge Structural and Ornamental Iron Workers Local Union No. 1, Sidney I. Cole, Chairman, Frank D. Rieland, Treasurer, A. Walter Becker, Thomas Cannon, James Eads, Joseph Frankovic, Standford Jacobs and Edmund D. Flood, Apprentice Co-Ordinator, and each of them, their agents, servants, employees and attorneys and all persons in active concert and participation with them are hereby jointly and severally commanded forthwith to certify for indenture as apprentices the plaintiffs Ronald L. Todd and James Hill and to thereupon immediately tender them for employment as apprenticeship Ironworkers to Bethlehem Steel Company, and further, they are ordered hereinafter to cease and desist from continued and further discrimination against negro applicants and applications.

*(Appendix A)*

It is hereby further ordered, adjudged and decreed that the defendants International Association of Bridge Structural and Ornamental Iron Workers, Local Union No. 1, Steve Zakula, President, Frank Pauley, Secretary-Treasurer, Joseph Frankovic, Job Representative, and Edmund D. Flood, Apprentice Co-Ordinator, their agents, servants, employees and attorneys and all persons in active concert and participation with them are hereby individually and collectively, jointly and severally commanded forthwith to admit the said plaintiffs Ronald L. Todd and James Hill to membership in the said Union as apprentices and they and each of them are hereby further restrained from interfering in any way directly or indirectly with the full and peaceful enjoyment by the said plaintiffs of all of the rights, privileges and profits lawfully appertaining to such membership, and further, they are hereinafter ordered to cease and desist from continued and further discrimination against negro applicants for membership.

It is hereby further ordered, adjudged and decreed that the defendant Bethlehem Steel Company employ as Apprentice Iron Workers the said Todd and Hill upon their certification and admission as aforesaid.

It is hereby further ordered that the costs of this proceeding be taxed against the Joint Apprenticeship Committee and Iron Workers Bridge and Structural Union, Local No. 1.

Counsel for plaintiffs is hereby directed to prepare and submit to the court within five days hereof, detailed Findings of Fact, Conclusions of Law and a formal Decree of Preliminary Injunction in conformity with the views here expressed.

Judgment accordingly.

# APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
for the Seventh Circuit

May 26, 1964

Before HASTINGS, *Chief Judge*, and KNOCH and KILEY, *Circuit Judges*.

HASTINGS, *Chief Judge*. These consolidated appeals are presently before us on three motions to remand this cause to the district court to dismiss alleging that the issues raised have become moot. We feel constrained to hear these motions in advance of the case on the merits because of the critical issues raised therein.

On October 26, 1962, defendants Paschen Contractors, Inc. and Peter Kiewit Sons' Co. (Contractor) entered into Contract No. GS-5PC-1178 to construct a United States Court House and Federal Office Building in Chicago, Illinois, to be paid for from and with public funds of the United States.

The construction of such building was commenced shortly thereafter and has continued in progress down to the present time.

Contractor entered into a subcontract with defendant Bethlehem Steel Company (Bethlehem) for the fabrication and erection of structural steel on such project. Bethlehem was engaged in such work in 1963 during the period when the events complained of herein took place.

On October 23, 1963, Bethlehem completed all work on the project, including steel erection, called for in its sub-

contract. It has had no employees working at the construction site since said date of completion.

Iron Workers Bridge and Structural Union, Local No. 1 and Iron Workers District Council of Chicago & Vicinity, with certain of their respective officers and representatives, defendants (collectively referred to as Union), had a collective bargaining agreement with Bethlehem whereby it was the sole supplier of iron workers to Bethlehem on said project.

Union is a voluntary unincorporated association of 2600 or more persons, including apprentices, engaged in working as journeymen iron workers or apprentice iron workers in the Chicago area.

Contractor's Contract No. GS-5PC-1178 and Bethlehem's subcontract both specifically included by reference the terms of Presidential Executive Order No. 10925 of March 6, 1961. This Executive Order, *inter alia*, is generally directed against racial or other discrimination in the performance of governmental contracts such as the construction project under present consideration.

One of the provisions of Contract No. GS-5PC-1178 was that apprentices "will be permitted to work only under a bona fide apprenticeship program" registered and recognized as therein set out.

At all times material herein, there was in full force and effect in Illinois such a bona fide apprenticeship program for iron workers. Joint Apprenticeship Committee of the Steel Workers of Chicago and International Association of Bridge, Structural and Ornamental Iron Workers Local Union No. 1 and its officers and members, defendants (collectively referred to as Joint Committee), was responsible for the administration of the iron worker apprenticeship standards in the Chicago area.

*(Appendix B)*

Joint Committee was composed of three representatives of Chicago Steel Erectors and three representatives of Union, selected by their respective organizations. Defendant Edmund D. Flood is the Apprentice Co-Ordinator of the Joint Committee.

The standards of the iron worker apprenticeship program had proper approval by the United States Department of Labor, of which defendant Alvin Dost was Regional Director.

At all times material herein, defendant Dominic Tesauro was Regional Administrator, General Services Administration (GSA), and was charged with the enforcement and administration of the construction contract for the United States.

The Board of Education of tne City of Chicago (Board of Education), defendant, is a municipal corporation of Illinois operating a public school system in the City of Chicago. Board of Education is a party solely because of its participation in the apprenticeship training program.

In accordance with the requirements of Presidential Executive Order No. 10925, Contractor reported to GSA that on March 25, 1963 there were no Negroes, either journeymen or apprentices, in the Union. Bethlehem reported to GSA on May 15, 1963 that as of April 14, 1963, it had a total of 101 employees on the project site of whom 79 were structural iron workers, 6 of these being apprentices, and that none of such employees was a Negro. Bethlehem reported that its peak employment would probably be reached on about May 22, 1963. Later, Bethlehem reported to GSA that as of June 16, 1963, it had 146 employees on the project site of whom 128 were structural iron workers, 8 of these being apprentices, and that none was a Negro.

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On May 23, 1963, on demand by GSA, Bethlehem requested of Union written assurances that Union would comply with the non-discrimination policies of Executive Order No. 10925. Union did not provide any such statement. At about the same time, Union informed Tesauro, Bethlehem and Dost that it would not accept Negro structural iron workers or apprentices for work on this construction project.

Ronald L. Todd, Michael Cochran and James Hill, plaintiffs, were male Negroes ranging in age from 18 to 23 years. On about June 7, 1963, plaintiffs were referred to Contractor by the Illinois State Employment Service and the Department of Labor as applicants for employment as iron worker apprentices training, after having been examined and found to be possessed of both aptitude for and interest in the trade.

On about June 24, 1963, Bethlehem examined plaintiffs and found them to be qualified to be hired as apprentice iron workers. On the same date, each of plaintiffs properly executed and filed an application for indenture as an apprentice iron worker with Joint Committee

On about June 28, 1963, Bethlehem stated it was in a position to give two of plaintiffs immediate employment on the construction project if they were indentured by Joint Committee and requested Joint Committee to indenture two of plaintiffs. None of plaintiffs was ever examined by Joint Committee or indentured or submitted to Bethlehem for employment.

Beginning about July 1, 1963, Tesauro began a series of unsuccessful attempts to induce Joint Committee to indenture two of the three plaintiffs. Bethlehem unsuccessfully renewed its request to Joint Committee on July 12, 1963.

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By letter of July 15, 1963, Joint Committee again denied the request and offered to supply any additional apprentices required from among the other applicants in its files. At this time, Joint Committee claimed to have on file 150 applicants who had applied before plaintiffs. Many of these were found to be unavailable when subsequently called.

On about July 19, 1963, Tesauro referred the whole matter to the President's Committee on Equal Job Opportunity. On September 23, 1963, that Committee reported to Tesauro that it would take no action.

As of September, 1963, there were 853 persons employed on the construction site; of these 171, or approximately 20%, were Negroes. Of these 171 Negro employees, 43 were journeymen, 11 were apprentices and the remainder were laborers. Of the sixteen crafts then working on the construction site, only Union and Joint Committee were not represented by Negro employees.

With the foregoing factual situation present, on September 26, 1963, plaintiffs filed their complaint against defendants in the district court. The complaint alleged in substance:

(1) Provisions of Contract No. GS-5PC-1178.

(2) Provisions of the iron workers apprenticeship program.

(3) That plaintiffs were native born citizens and Negroes.

(4) That plaintiffs and all persons who constitute the class to which they belong were eligible to qualify for the apprenticeship training program; that they made application therefor and were denied certification solely because of their race and color.

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(5) That in April, 1963 plaintiffs sought employment on the construction project from Bethlehem, which was denied because they were Negroes.

(6) That plaintiffs brought the action on behalf of themselves and the class to which they belong and have failed to secure enforcement of their rights to employment under the terms of Contract No. GS-5PC-1178.

(7) Provisions of Executive Order No. 10925.

Plaintiffs prayed for the following relief in their complaint:

"Wherefore, the plaintiffs respectfully pray this Court to enjoin the defendants and each of them from proceeding with the performance of Contract No. GS-5PC-1178 unless and until plaintiffs and each of them is duly and regularly employed as an iron workers apprentice or in the alternative that this Court enjoin and restrain the defendants and each of them from making or receiving any payments on account of such contract unless and until plaintiffs and each of them is duly and regularly employed as an iron workers apprentice."

The trial court held an extended hearing on the issue of a preliminary injunction. Some of the defendants introduced no evidence. The evidence considered by the trial court related primarily to Contract No. GS-5PC-1178 and the failure of Bethlehem to employ plaintiffs on that construction project.

On October 11, 1963, Bethlehem filed its motion for judgment at the close of all evidence, in part on the ground that the issues were moot since no more apprentice iron workers would be employed on the job site in question, its subcontract being substantially completed at that time.

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On October 16, 1963, the district court rendered an able, extensive and comprehensive opinion. This is reported in *Todd* v. *Joint Apprenticeship Com. of Steel Wkrs. of Chicago*, N.D. Ill. E.D., 223 F. Supp. 12, and reference thereto is now made.

On October 22, 1963, respective counsel of the parties appeared before the trial court for the purpose of setting bond, the entry of formal findings of fact and conclusions of law and a formal decree. At that time, Bethlehem advised the court that "all work of Bethlehem on the site in question will be concluded tomorrow." The court then stated, "Very well, the record may so show."

On October 25, 1963, Bethlehem filed affidavits with the trial court that all work in fulfillment of its subcontract on the construction site was completed on October 23, 1963. No one disputed that such was the fact.

On November 8, 1963, the trial court filed its comprehensive findings of fact, conclusions of law and draft of preliminary injunction and adopted them as its own and ordered them entered *nunc pro tunc* as of October 16, 1963.

In sum, the findings recited the factual history of the case; that there had been no discrimination against plaintiffs by Contractor or Bethlehem; that there had been racial discrimination against plaintiffs by Union and Joint Committee; and that Bethlehem's rejection of plaintiff Michael Cochran because of his lack of qualifications was not discriminatorily motivated.

The trial court concluded, *inter alia*, that this suit was properly brought as a class action and that unless restrained Union and Joint Committee would continue their discriminatory practices against plaintiffs and their class;

that plaintiffs Todd and Hill were entitled to a preliminary injunction requiring Bethlehem to employ them as apprenticeship iron workers when properly certified by Union and Joint Committee.

A decree of preliminary injunction was entered accordingly.

Our study of the record convinces us that plaintiffs, by this action, sought to enjoin defendants from proceeding with the performance of Contract No. GS-5PC-1178 unless and until they were regularly employed as iron worker apprentices by Bethlehem on this construction site; or, in the alternative, restraining further payments to or by Contractor and Bethlehem until such employment was granted.

Bethlehem completed all work on its subcontract on October 23, 1963. At the time the preliminary injunction was entered on November 8, 1963, even though *nunc pro tunc* as of October 16, 1963, the matter in controversy had become moot. Bethlehem had no other steel erection activities in the Chicago area.

Plaintiffs[1] contend that the matter should now go back to the trial court for further hearing on a permanent injunction, including the issue of discrimination as it may relate to other construction contracts not now under consideration. This would require the determination of an abstract question. This we cannot do. The subject matter of the litigation is no longer an actual controversy. The time for determination of the questions involved in this action has passed. No relief within the scope of the complaint could now be granted. *Johnson-Kennedy Radio Corp.* v. *Chicago Bears F. Club*, 7 Cir., 97 F. 2d 223 (1938).

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[1]Plaintiff Michael Cochran did not join in this appeal.

See also *Bus Employees* v. *Wisconsin Board*, 340 U.S. 416 (1951).

While we hold no brief for the character of discrimination charged herein and found by the district court, we do not reach the question of the validity of the trial court's findings and conclusions and its judgment and decree based thereon. In the instant case, we have before us merely a temporary injunction applicable only to the specific construction project to which it is addressed.

Further, we do not decide here whether the district court had authority to apply an injunction retroactively by the issuance of a *nunc pro tunc* order.

We follow the established practice of the Supreme Court that when an issue or controversy becomes moot prior to or during an appeal that all prior orders shall be vacated and the cause remanded with instructions to dismiss. *Railroad Trainmen* v. *Chicago & I. M. R. Co.*, 375 U.S. 18 (1963);[2] *Davis* v. *Soja*, 374 U.S. 495 (1963).[3]

The judgment and decree of the United States District Court for the Northern District of Illinois entered November 8, 1963, *nunc pro tunc* as of October 16, 1963, are vacated and this case is remanded to such court with directions to dismiss the complaint as to all defendants as moot.

JUDGMENT VACATED AND CASE REMANDED WITH INSTRUCTIONS.

A true Copy:

Teste: .....

*Clerk of the United States Court of Appeals for the Seventh Circuit.*

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[2]Reported below: 315 F. 2d 771 (7 Cir.).
[3]Reported below: 303 F. 2d 601 (7 Cir.).

# APPENDIX C

## CONSTITUTIONAL PROVISIONS INVOLVED.

Fifth Amendment, United States Constitution:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

# APPENDIX D

## STATUTES INVOLVED.

28 U.S.C., § 1331:

"The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $3,000, exclusive of interest and costs, and arises under the Constitution, laws or treaties of the United States."

28 U.S.C., § 1343(3):

"To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States."

28 U.S.C., § 1346(a)(2):

"The district courts shall have original jurisdiction, concurrent with the Court of Claims, of:

(2) Any other civil action or claim against the United States, not exceeding $10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort."

28 U.S.C., § 1361:

"The district courts shall have original jurisdiction of any action in the nature of mandamus to com-

pel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff."

29 U.S.C., § 157:

"Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title."

29 U.S.C., § 158:

"(a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;

(2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it; *Provided*, That subject to rules and regulations made and published by the Board pursuant to section 156 of this title, an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay;

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employ-

ment to encourage or discourage membership in any labor organization: *Provided,* That nothing in this subchapter, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this subsection as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 159(a) of this title, in the appropriate collective-bargaining unit covered by such agreement when made and has at the time the agreement was made or within the preceding twelve months received from the Board a notice of compliance with section 159 (f), (g), (h) of this title, and (ii) unless following an election held as provided in section 159 (e) of this title within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: *Provided further,* That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that mem-

bership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

(4) to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this subchapter;

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title.

(b) It shall be an unfair labor practice for a labor organization or its agents—

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 157 of this title: *Provided*, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; or (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances;

(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a) (3) of this section or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

(3) to refuse to bargain collectively with an employer, provided it is the representative of his em-

ployees subject to the provisions of section 159(a) of this title;

(4) to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is: (A) forcing or requiring any employer or self-employed person to join any labor or employer organization or any employer or other person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person; (B) forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 159 of this title; (C) forcing or requiring any employer to recognize or bargain with a particular labor organization as the representative of his employees if another labor organization has been certified as the representative of such employees under the provisions of section 159 of this title; (D) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class, unless such employer is failing to conform to an order or certification of the Board

determining the bargaining representative for employees performing such work: *Provided,* That nothing contained in this subsection shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under this subchapter;

(5) to require of employees covered by an agreement authorized under subsection (a) (3) of this section the payment, as a condition precedent to becoming a member of such organization, of a fee in an amount which the Board finds excessive or discriminatory under all the circumstances. In making such a finding, the Board shall consider, among other relevant factors, the practices and customs of labor organizations in the particular industry, and the wages currently paid to the employees affected; and

(6) to cause or attempt to cause an employer to pay or deliver or agree to pay or deliver any money or other thing of value, in the nature of an exaction, for services which are not performed or not to be performed.

(c) The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this subchapter, if such expression contains no threat of reprisal or force or promise of benefit.

*(Appendix D)*

(d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: *Provided,* That where there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification—

(1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification;

(2) offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modifications;

(3) notifies the Federal Mediation and Conciliation Service within thirty days after such notice of the existence of a dispute, and simultaneously therewith notifies any State or Territorial agency established to mediate and conciliate disputes within the

State or Territory where the dispute occurred, provided no agreement has been reached by that time; and

(4) continues in full force and effect, without resorting to strike or lock-out, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later:

The duties imposed upon employers, employees, and labor organizations by paragraphs (2)-(4) of this subsection shall become inapplicable upon an intervening certification of the Board, under which the labor organization or individual, which is a party to the contract, has been superseded as or ceased to be the representative of the employees subject to the provisions of section 159(a) of this title, and the duties so imposed shall not be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract. Any employee who engages in a strike within the sixty-day period specified in this subsection shall lose his status as an employee of the employer engaged in the particular labor dispute, for the purposes of sections 158-160 of this title, but such loss of status for such employee shall terminate if and when he is reemployed by such employer."

*(Appendix D)*

42 U.S.C., § 1981:

"All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other."

42 U.S.C., § 1983:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

# APPENDIX E

## FEDERAL RULES INVOLVED.

Rule 17(b), Federal Rules of Civil Procedure:

"(b) *Capacity to Sue or Be Sued.* The capacity of an individual, other than one acting in a representative capacity, to sue or be sued shall be determined by the law of his domicile. The capacity of a corporation to sue or be sued shall be determined by the law under which it was organized. In all other cases capacity to sue or be sued shall be determined by the law of the state in which the district court is held, except (1) that a partnership or other unincorporated association, which has no such capacity by the law of such state, may sue or be sued in its common name for the purpose of enforcing for or against it a substantive right existing under the Constitution or laws of the United States, and (2) that the capacity of a receiver appointed by a court of the United States to sue or be sued in a court of the United States is governed by Title 28, U.S.C., §§ 754 and 959(a)."

Rule 23(a)(3), Federal Rules of Civil Procedure:

"(a) *Representation.* If persons constituting a class are so numerous as to make it impracticable to bring them all before the court, such of them, one or more, as will fairly insure the adequate representation of all may, on behalf of all, sue or be sued, when the character of the right sought to be enforced for or against the class is

(3) several, and there is a common question of law or fact affecting the several rights and a common relief is sought."

# APPENDIX F

## EQUAL EMPLOYMENT OPPORTUNITY.

No. 10925

March 8, 1961, 26 F.R. 1977
Establishing The President's Committee On Equal Employment Opportunity

Whereas discrimination because of race, creed, color, or national origin is contrary to the Constitutional principles and policies of the United States; and

Whereas it is the plain and positive obligation of the United States Government to promote and ensure equal opportunity for all qualified persons, without regard to race, creed, color, or national origin, employed or seeking employment with the Federal Government and on government contracts; and

Whereas it is the policy of the executive branch of the Government to encourage by positive measures equal opportunity for all qualified persons within the Government; and

Whereas it is in the general interest and welfare of the United States to promote its economy, security, and national defense through the most efficient and effective utilization of all available manpower; and

Whereas a review and analysis of existing Executive orders, practices, and government agency procedures relating to government employment and compliance with existing non-discrimination contract provisions reveal an urgent need for expansion and strengthening of efforts to promote full equality of employment opportunity; and

Whereas a single governmental committee should be

charged with responsibility for accomplishing these objectives:

Now, Therefore, by virtue of the authority vested in me as President of the United States by the Constitution and statutes of the United States, it is ordered as follows:

*Part I—Establishment Of The President's Committee On Equal Employment Opportunity*

Section 101. There is hereby established the President's Committee on Equal Employment Opportunity.

Sec. 102. The Committee shall be composed as follows:

(a) The Vice President of the United States, who is hereby designated Chairman of the Committee and who shall preside at meetings of the Committee.

(b) The Secretary of Labor, who is hereby designated Vice Chairman of the Committee and who shall act as Chairman in the absence of the Chairman. The Vice Chairman shall have general supervision and direction of the work of the Committee and of the execution and implementation of the policies and purposes of this order.

(c) The Chairman of the Atomic Energy Commission, the Secretary of Commerce, the Attorney General, the Secretary of Defense, the Secretaries of the Army, Navy and Air Force, the Administrator of General Services, the Chairman of the Civil Service Commission, and the Administrator of the National Aeronautics and Space Administration. Each such member may designate an alternate to represent him in his absence.

(d) Such other members as the President may from time to time appoint.

(e) An Executive Vice Chairman, designated by the President, who shall be ex officio a member of the Com-

mittee. The Executive Vice Chairman shall assist the Chairman, the Vice Chairman and the Committee. Between meetings of the Committee he shall be primarily responsible for carrying out the functions of the Committee and may act for the Committee pursuant to its rules, delegations, and other directives. Final action in individual cases or classes of cases may be taken and final orders may be entered on behalf of the Committee by the Executive Vice Chairman when the Committee so authorizes.

Sec. 103. The Committee shall meet upon the call of the Chairman and at such other times as may be provided by its rules and regulations. It shall (a) consider and adopt rules and regulations to govern its proceedings; (b) provide generally for the procedures and policies to implement this order; (c) consider reports as to progress under this order; (d) consider and act, where necessary or appropriate, upon matters which may be presented to it by any of its members; and (e) make such reports to the President as he may require or the Committee shall deem appropriate. Such reports shall be made at least once annually and shall include specific references to the actions taken and results achieved by each department and agency. The Chairman may appoint sub-committees to make special studies on a continuing basis.

*Part II—Nondiscrimination In Government Employment*

Section 201. The President's Committee on Equal Employment Opportunity established by this order is directed immediately to scrutinize and study employment practices of the Government of the United States, and to consider and recommend additional affirmative steps which

should be taken by executive departments and agencies to realize more fully the national policy of nondiscrimination within the executive branch of the Government.

Sec. 202. All executive departments and agencies are directed to initiate forthwith studies of current government employment practices within their responsibility. The studies shall be in such form as the Committee may prescribe and shall include statistics on current employment patterns, a review of current procedures, and the recommendation of positive measures for the elimination of any discrimination, direct or indirect, which now exists. Reports and recommendations shall be submitted to the Executive Vice Chairman of the Committee no later than sixty days from the effective date of this order, and the Committee, after considering such reports and recommendations, shall report to the President on the current situation and recommend positive measures to accomplish the objectives of this order.

Sec. 203. The policy expressed in Executive Order No. 10590 of January 18, 1955 (20 F.R. 409),[6] with respect to the exclusion and prohibition of discrimination against any employee or applicant for employment in the Federal Government because of race, color, religion, or national origin is hereby reaffirmed.

Sec. 204. The President's Committee on Government Employment Policy, established by Executive Order No. 10590 of January 18, 1955 (20 F.R. 409), as amended by Executive Order No. 10722 of August 5, 1957 (22 F.R. 6287),[7] is hereby abolished, and the powers, functions,

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[6] 5 U.S.C.A. § 631 note.

[7] 1957 U.S. Code Cong. & Adm. News, p. 924.

and duties of that Committee are hereby transferred to, and henceforth shall be vested in, and exercised by, the President's Committee on Equal Employment Opportunity in addition to the powers conferred by this order.

*Part III—Obligation Of Government Contractors And Subcontractors*

Subpart A—Contractor's Agreements

Section 301. Except in contracts exempted in accordance with section 303 of this order, all government contracting agencies shall include in every government contract hereafter entered into the following provisions:

"In connection with the performance of work under this contract, the contractor agrees as follows:

"(1) The contractor will not discriminate against any employee or applicant for employment because of race, creed, color, or national origin. The contractor will take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, creed, color, or national origin. Such action shall include, but not be limited to, the following: employment, upgrading, demotion or transfer; recruitment or recruitment advertising; layoff or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeship. The contractor agrees to post in conspicuous places, available to employees and applicants for employment, notices to be provided by the contracting officer setting forth the provisions of this nondiscrimination clause.

"(2) The contractor will, in all solicitations or advertisements for employees placed by or on behalf of the

contractor, state that all qualified applicants will receive consideration for employment without regard to race, creed, color, or national origin.

"(3) The contractor will send to each labor union or representative of workers with which he has a collective bargaining agreement or other contract or understanding, a notice, to be provided by the agency contracting officer, advising the said labor union or workers' representative of the contractor's commitments under this section, and shall post copies of the notice in conspicuous places available to employees and applicants for employment.

"(4) The contractor will comply with all provisions of Executive Order No. 10925 of March 6, 1961, and of the rules, regulations, and relevant orders of the President's Committee on Equal Employment Opportunity created thereby.

"(5) The contractor will furnish all information and reports required by Executive Order No. 10925 of March 6, 1961, and by the rules, regulations, and orders of the said Committee, or pursuant thereto, and will permit access to his books, records, and accounts by the contracting agency and the Committee for purposes of investigation to ascertain compliance with such rules, regulations, and orders.

"(6) In the event of the contractor's non-compliance with the non-discrimination clauses of this contract or with any of the said rules, regulations, or orders, this contract may be cancelled in whole or in part and the contractor may be declared ineligible for further government contracts in accordance with procedures authorized in Executive Order No. 10925 of March 6, 1961, and such other sanctions may be imposed and remedies invoked

as provided in the said Executive order or by rule, regulation, or order of the President's Committee on Equal Employment Opportunity, or as otherwise provided by law.

"(7) The contractor will include the provisions of the foregoing paragraphs (1) through (6) in every subcontract or purchase order unless exempted by rules, regulations, or orders of the President's Committee on Equal Employment Opportunity issued pursuant to section 303 of Executive Order No. 10925 of March 6, 1961, so that such provisions will be binding upon each subcontractor or vendor. The contractor will take such action with respect to any subcontract or purchase order as the contracting agency may direct as a means of enforcing such provisions, including sanctions for non-compliance: *Provided, however*, that in the event the contractor becomes involved in, or is threatened with, litigation with a subcontractor or vendor as a result of such direction by the contracting agency, the contractor may request the United States to enter into such litigation to protect the interests of the United States."

Sec. 302. (a) Each contractor having a contract containing the provisions prescribed in section 301 shall file, and shall cause each of its subcontractors to file, Compliance Reports with the contracting agency, which will be subject to review by the Committee upon its request. Compliance Reports shall be filed within such times and shall contain such information as to the practices, policies, programs, and employment statistics of the contractor and each subcontractor, and shall be in such form as the Committee may prescribe.

*(Appendix F)*

(b) Bidders or prospective contractors or subcontractors may be required to state whether they have participated in any previous contract subject to the provisions of this order, and in that event to submit, on behalf of themselves and their proposed subcontractors, Compliance Reports prior to or as an initial part of their bid or negotiation of a contract.

(c) Whenever the contractor or subcontractor has a collective bargaining agreement or other contract or understanding with a labor union or other representative of workers, the Compliance Report shall include such information as to the labor union's or other representative's practices and policies affecting compliance as the Committee may prescribe: *Provided,* that to the extent such information is within the exclusive possession of a labor union or other workers' representative and the labor union or representative shall refuse to furnish such information to the contractor, the contractor shall so certify to the contracting agency as part of its Compliance Report and shall set forth what efforts he has made to obtain such information.

(d) The Committee may direct that any bidder or prospective contractor or subcontractor shall submit, as part of his Compliance Report, a statement in writing, signed by an authorized officer or agent of any labor union or other workers' representative with which the bidder or prospective contractor deals, together with supporting information, to the effect that the said labor union's or representative's practices and policies do not discriminate on the grounds of race, color, creed, or national origin, and that the labor union or representative either will affirmatively cooperate, within the limits of

his legal and contractual authority, in the implementation of the policy and provisions of this order or that it consents and agrees that recruitment, employment, and the terms and conditions of employment under the proposed contract shall be in accordance with the purposes and provisions of the order. In the event that the union or representative shall refuse to execute such a statement, the Compliance Report shall so certify and set forth what efforts have been made to secure such a statement.

Sec. 303. The Committee may, when it deems that special circumstances in the national interest so require, exempt a contracting agency from the requirement of including the provisions of section 301 of this order in any specific contract, subcontract, or purchase order. The Committee may, by rule or regulation, also exempt certain classes of contracts, subcontracts, or purchase orders (a) where work is to be or has been performed outside the United States and no recruitment of workers within the limits of the United States is involved; (b) for standard commercial supplies or raw materials; or (c) involving less than specified amounts of money or specified numbers of workers.

## Subpart B—Labor Unions And Representatives Of Workers

Sec. 304. The Committee shall use its best efforts, directly and through contracting agencies, contractors, state and local officials and public and private agencies, and all other available instrumentalities, to cause any labor union, recruiting agency or other representative of workers who is or may be engaged in work under government contracts to cooperate with, and to comply in the implementation of, the purposes of this order.

*(Appendix F)*

Sec. 305. The Committee may, to effectuate the purposes of section 304 of this order, hold hearings, public or private, with respect to the practices and policies of any such labor organization. It shall from time to time submit special reports to the President concerning discriminatory practices and policies of any such labor organization, and may recommend remedial action if, in its judgment, such action is necessary or appropriate. It may also notify any Federal, state, or local agency of its conclusions and recommendations with respect to any such labor organization which in its judgment has failed to cooperate with the Committee, contracting agencies, contractors, or subcontractors in carrying out the purposes of this order.

## Subpart C—Powers And Duties Of The President's Committee On Equal Employment Opportunity And Of Contracting Agencies

Sec. 306. The Committee shall adopt such rules and regulations and issue such orders as it deems necessary and appropriate to achieve the purposes of this order, including the purposes of Part II hereof relating to discrimination in government employment.

Sec. 307. Each contracting agency shall be primarily responsible for obtaining compliance with the rules, regulations, and orders of the Committee with respect to contracts entered into by such agency or its contractors, or affecting its own employment practices. All contracting agencies shall comply with the Committee's rules in discharging their primary responsibility for securing compliance with the provisions of contracts and otherwise with the terms of this Executive order and of the rules, regula-

tions, and orders of the Committee pursuant hereto. They are directed to cooperate with the Committee, and to furnish the Committee such information and assistance as it may require in the performance of its functions under this order. They are further directed to appoint or designate, from among the agency's personnel, compliance officers. It shall be the duty of such officers to seek compliance with the objectives of this order by conference, conciliation, mediation, or persuasion.

Sec. 308. The Committee is authorized to delegate to any officer, agency, or employee in the executive branch of the Government any function of the Committee under this order, except the authority to promulgate rules and regulations of a general nature.

Sec. 309. (a) The Committee may itself investigate the employment practices of any government contractor or subcontractor, or initiate such investigation by the appropriate contracting agency or through the Secretary of Labor, to determine whether or not the contractual provisions specified in section 301 of this order have been violated. Such investigation shall be conducted in accordance with the procedures established by the Committee, and the investigating agency shall report to the Committee any action taken or recommended.

(b) The Committee may receive and cause to be investigated complaints by employees or prospective employees of a government contractor or subcontractor which allege discrimination contrary to the contractual provisions specified in section 301 of this order. The appropriate contracting agency or the Secretary of Labor, as the case may be, shall report to the Committee what action has been taken or is recommended with regard to such complaints.

*(Appendix F)*

Sec. 310. (a) The Committee, or any agency or officer of the United States designated by rule, regulation, or order of the Committee, may hold such hearings, public or private, as the Committee may deem advisable for compliance, enforcement, or educational purposes.

(b) The Committee may hold, or cause to be held, hearings in accordance with subsection (a) of this section prior to imposing, ordering, or recommending the imposition of penalties and sanctions under this order, except that no order for debarment of any contractor from further government contracts shall be made without a hearing.

Sec. 311. The Committee shall encourage the furtherance of an educational program by employer, labor, civic, educational, religious, and other non-governmental groups in order to eliminate or reduce the basic causes of discrimination in employment on the ground of race, creed, color, or national origin.

## Subpart D—Sanctions And Penalties

Sec. 312. In accordance with such rules, regulations or orders as the Committee may issue or adopt, the Committee or the appropriate contracting agency may:

(a) Publish, or cause to be published, the names of contractors or unions which it has concluded have complied or have failed to comply with the provisions of this order or of the rules, regulations, and orders of the Committee.

(b) Recommend to the Department of Justice that, in cases where there is substantial or material violation or the threat of substantial or material violation of the contractual provisions set forth in section 301 of this order,

appropriate proceedings be brought to enforce those provisions, including the enjoining, within the limitations of applicable law, of organizations, individuals or groups who prevent directly or indirectly, or seek to prevent directly or indirectly, compliance with the aforesaid provisions.

(c) Recommend to the Department of Justice that criminal proceedings be brought for the furnishing of false information to any contracting agency or to the Committee as the case may be.

(d) Terminate, or cause to be terminated, any contract, or any portion or portions thereof, for failure of the contractor or subcontractor to comply with the nondiscrimination provisions of the contract. Contracts may be terminated absolutely or continuance of contracts may be conditioned upon a program for future compliance approved by the contracting agency.

(e) Provide that any contracting agency shall refrain from entering into further contracts, or extensions or other modifications of existing contracts, with any noncomplying contractor, until such contractor has satisfied the Committee that he has established and will carry out personnel and employment policies in compliance with the provisions of this order.

(f) Under rules and regulations prescribed by the Committee, each contracting agency shall make reasonable efforts within a reasonable time limitation to secure compliance with the contract provisions of this order by methods of conference, conciliation mediation, and persuasion before proceedings shall be instituted under paragraph (b) of this section, or before a contract shall be terminated in whole or in part under paragraph (d) of

this section for failure of a contractor or subcontractor to comply with the contract provisions of this order.

Sec. 313. Any contracting agency taking any action authorized by this section, whether on its own motion, or as directed by the Committee, or under the Committee's rules and regulations, shall promptly notify the Committee of such action or reasons for not acting. Where the Committee itself makes a determination under this section, it shall promptly notify the appropriate contracting agency of the action recommended. The agency shall take such action and shall report the results thereof to the Committee within such time as the Committee shall provide.

Sec. 314. If the Committee shall so direct, contracting agencies shall not enter into contracts with any bidder or prospective contractor unless the bidder or prospective contractor has satisfactorily complied with the provisions of this order or submits a program for compliance acceptable to the Committee or, if the Committee so authorizes, to the contracting agency.

Sec. 315. Whenever a contracting agency terminates a contract, or whenever a contractor has been debarred from further government contracts, because of noncompliance with the contractor provisions with regard to non-discrimination, the Committee, or the contracting agency involved, shall promptly notify the Comptroller General of the United States.

## Subpart E—Certificate Of Merit

Sec. 316. The Committee may provide for issuance of a United States Certificate of Merit to employers or employee organizations which are or may hereafter be en-

gaged in work under government contracts, if the Committee is satisfied that the personnel and employment practices of the employer, or that the personnel, training, apprenticeship, membership, grievance and representation, upgrading and other practices and policies of the employee organization, conform to the purposes and provisions of this order.

Sec. 317. Any Certificate of Merit may at any time be suspended or revoked by the Committee if the holder thereof, in the judgment of the Committee, has failed to comply with the provisions of this order.

Sec. 318. The Committee may provide for the exemption of any employer or employee organization from any requirement for furnishing information as to compliance if such employer or employee organization has been awarded a Certificate of Merit which has not been suspended or revoked.

*Part IV—Miscellaneous*

Section 401. Each contracting agency (except the Department of Justice) shall defray such necessary expenses of the Committee as may be authorized by law, including section 214 of the Act of May 3, 1945, 59 Stat. 134 (31 U.S.C. 691):[8] *Provided,* that no agency shall supply more than fifty per cent of the funds necessary to carry out the purposes of this order. The Department of Labor shall provide necessary space and facilities for the Committee. In the case of the Department of Justice, the contribution shall be limited to furnishing legal services.

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[8]31 U.S.C.A. § 691.

*(Appendix F)*

Sec. 402. This order shall become effective thirty days after its execution. The General Services Administration shall take appropriate action to revise the standard Government contract forms to accord with the provisions of this order and of the rules and regulations of the Committee.

Sec. 403. Executive Order No. 10479 of August 13, 1953 (18 F.R. 4899),[9] together with Executive Orders Nos. 10482 of August 15, 1953 (18 F.R. 4944),[10] and 10733 of October 10, 1957 (22 F.R. 8135),[11] amending that order, and Executive Order No. 10557 of September 3, 1954 (19 F.R. 5655),[12] are hereby revoked, and the Government Contract Committee established by Executive Order No. 10479 is abolished. All records and property of or in the custody of the said Committee are hereby transferred to the President's Committee on Equal Employment Opportunity, which shall wind up the outstanding affairs of the Government Contract Committee.

JOHN F. KENNEDY

THE WHITE HOUSE,
*March 6, 1961.*

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[9] 41 U.S.C.A. prec § 1 note.
[10] 1953 U.S. Code Cong. & Adm. News, p. 1052.
[11] 41 U.S.C.A. prec. § 1 note.
[12] 41 U.S.C.A. prec. § 1 note.

# APPENDIX G

## DECREE OF PRELIMINARY INJUNCTION.

This cause coming on to be heard on plaintiffs' motion for a preliminary injunction; upon consideration of the evidence, argument of counsel, briefs, pleadings and the entire court record in this cause and based on the findings of fact and conclusions of law approved and signed by the court and particularly because the Constitution of the United States has been violated in discriminatory denial of job opportunities.

It Is Hereby Ordered, Adjudged And Decreed that the motion of the plaintiff, Michael Cochran for a preliminary injunction be and the same is hereby denied.

It Is Hereby Ordered, Adjudged And Decreed that the motions of plaintiffs, Ronald L. Todd and James Hill, for a preliminary injunction be and the same are hereby granted and the same hereby issue on the following named defendants, their officers, agents, servants, employees and attorneys and all persons in active concert and participation with them who receive actual notice of the order by personal service or otherwise, individually and collectively, jointly and severally, as follows:

1. That the Joint Apprenticeship Committee Of The Steel Workers Of Chicago And International Association Of Bridge, Structural And Ornamental Iron Workers Local Union No. 1, Sidney I. Cole, Chairman, Frank D. Reiland, Treasurer, A. Walter Becker, Thomas Cannon, James Eads, Joseph Frankovic, Stanford Jacobs, and Edmund D. Flood, Apprentice Co-Ordinator, and each of them, are hereby commanded forth-

with to certify for indenture as apprentices the plaintiffs Ronald L. Todd and James Hill and to thereupon immediately tender them for employment as apprenticeship iron workers to Bethlehem Steel Company, and further, they are ordered hereinafter to cease and desist from continued and further discrimination against Negro applicants and applications.

2. That the defendants, International Association Of Bridge, Structural And Ornamental Iron Workers Local Union No. 1, Sidney I. Cole, Chairman, Frank D. Reiland, Treasurer, A. Walter Becker, Thomas Cannon, James Eads, Joseph Frankovic, Stanford Jacobs and Edmund D. Flood, Apprentice Co-Ordinator, are hereby commanded forthwith to admit the said plaintiffs, Ronald L. Todd and James Hill, to membership in the said Union as iron worker apprentices and they and each of them are hereby further restrained from interfering in any way directly or indirectly with the full and peaceful enjoyment by the said plaintiffs of all of the rights, privileges and profits lawfully appertaining to such membership, and further, they are hereinafter ordered to cease and desist from continued and further discrimination against Negro applicants for membership.

3. That the defendant, Bethlehem Steel Company, employ as apprentice iron workers the said plaintiffs, Ronald L. Todd and James Hill, upon their certification as indentured apprentice iron workers and admission to the Union as apprentice iron workers.

4. That the defendant, Board Of Education Of The City Of Chicago, enroll and admit Ronald L. Todd and James Hill to apprenticeship iron worker classes

upon their certification as indentured apprentice iron workers.

5. That the defendant, Alvin Dost, Regional Director of the Bureau of Appr iceship and Training, use the full facilities of his office to assure that there will be no further discrimination.

It Is Further Ordered, Adjudged And Decreed that the costs of this proceeding be taxed against the Joint Apprenticeship Committee Of The Steel Workers Of Chicago And International Association Of Bridge, Structural And Ornamental Iron Workers Local Union No. 1 and the Iron Workers Bridge And Structural Union, Local No. 1.

/s/ Nunc pro tunc as of October 16, 1963, William J. Campbell

Enter: William J. Campbell
Chief Judge, United States District Court

Dated: November 8, 1963

LE COPY

Office-Supreme Court, U.S.
FILED
SEP 10 1964
JOHN F. DAVIS, CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1964.

**No. 380**

RONALD L. TODD, ET AL.,

*Petitioners,*

*vs.*

JOINT APPRENTICESHIP COMMITTEE, ETC., LOCAL UNION NO. 1, ETC., BETHLEHEM STEEL COMPANY, ET AL.,

*Respondents.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

## BRIEF OF BETHLEHEM STEEL COMPANY IN OPPOSITION.

PAUL R. CONAGHAN,
208 South LaSalle Street,
Chicago, Illinois 60604,
*Attorney for Bethlehem Steel Company, Respondent.*

STEVENSON, CONAGHAN, HACKBERT,
ROOKS and PITTS,
*Of Counsel.*

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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## BRIEF OF BETHLEHEM STEEL COMPANY IN OPPOSITION.

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### OPINIONS BELOW.

The opinions below are reported in 223 F. Supp. 12 and 332 F. 2d 243.

### OBJECTIONS TO JURISDICTION.

1. The issues are moot. Bethlehem has performed its subcontract with respect to Master Contract No. GS-5PC-1178 to construct a United States court house and federal building in Chicago. Bethlehem's liability was predicated

solely upon that contract. Performance was concluded on October 23, 1963. Plaintiffs have no employment rights against Bethlehem as directed in the mandatory injunction of the District Court.

2. The controversy has become academic because of change in circumstances. Bethlehem has completed its subcontract. The steel framework of the new federal court house building has been erected. The District Court found no discrimination by Bethlehem. There is no real controversy between the plaintiffs and Bethlehem.

3. The evidence and findings of fact show plaintiffs never had a cause of action against Bethlehem. The complaint should be dismissed for want of equity.

4. The failure of plaintiffs to exhaust administrative remedies bars a suit for injunction in a federal district court. The complaint should be dismissed.

## QUESTIONS PRESENTED.

1. Whether Negro plaintiffs, who alleged violation of race discrimination provisions in a subcontract by Bethlehem to produce, fabricate and erect the steel framework on a new United States court house and federal office building in Chicago, have employment rights to a mandatory injunction against Bethlehem for alleged violation of the race discrimination provisions in the subcontract, where the work required by the subcontract has been concluded on October 23, 1963, and where the District Court found as a fact that there was no discrimination by Bethlehem against plaintiffs on account of race, creed or color.

2. Whether plaintiffs, who were not indentured as apprentice iron workers and for that reason were not employed by Bethlehem, are entitled to a mandatory injunction directing that plaintiffs be employed by Bethlehem as

apprentice iron workers when properly indentured, where the District Court found as a fact that there had been no discrimination by Bethlehem against plaintiffs.

3. Whether this Court should reverse or vacate the decree against Bethlehem in the District Court and direct the District Court to dismiss the complaint against Bethlehem because the issues are moot.

4. Whether the judgment of the Court of Appeals is in conflict with decisions of this Court.

5. Whether the complaint and the evidence present a true class action.

## STATEMENT OF THE CASE.

### A.

### The Complaint.

The complaint filed in the United States District Court on September 26, 1963, in substance alleged:

1. On or about October 26, 1962, Paschen Contractors, Inc., a Delaware Corporation, and Peter Kiewit Son's Company, a Nebraska corporation (hereinafter referred to as contractors) entered into Contract No. GS-5PC-1178 to construct a United States court house and federal office building in Chicago. The complaint then set forth the anti-discrimination provisions of the contract.
2. Provisions of the iron workers apprenticeship program.
3. That plaintiffffs were native born citizens and Negroes and are physically able to perform work as apprentices.
4. That plaintiffs sought employment as apprentice iron workers by Bethlehem Steel Company, the sub-

contractor employed by the contractors to produce, fabricate and erect the steel framework of the building. That "Notwithstanding the application and qualification of plaintiffs and each of the persons similarly situated, Bethlehem Steel Company has failed and refused to employ these persons or any of them to work on the project covered by Contract No. GS-5PC-1178 solely because of their race and color."

5. That Contract No. GS-5PC-1178 was entered into for the benefit of the plaintiffs and persons similarly situated.
6. That "none of the defendants has secured enforcement of the rights of the plaintiffs or the class they represent under the terms of Contract No. GS-5PC-1178."
7. Provisions of Executive Order No. 10925 issued March 6, 1961.

Plaintiffs in their complaint prayed for relief as follows:

"WHEREFORE, the plaintiffs respectfully pray this Court to enjoin the defendants and each of them from proceeding with the performance of Contract No. GS-5PC-1178 unless and until plaintiffs and each of them is duly and regularly employed as an iron workers apprentice or in the alternative that this Court enjoin and restrain the defendants and each of them from making or receiving any payments on account of such contract unless and until plaintiffs and each of them is duly and regularly employed as an iron workers apprentice."

A Copy of the complaint is set forth in the appendix to this brief.

The District Court did not enjoin Bethlehem or contractors "from proceeding with the performance of Con-

tract No. GS-5PC-1178" and did not enjoin Bethlehem or contractors "from making or receiving any payments on account of such contract", as prayed for in the complaint. No amended complaint was filed by plaintiffs seeking alternate remedies. The District Court did make findings of fact, conclusions of law and issued a temporary injunction. Reference to this action by the District Court will be made later in this statement of the case.

B.

**Issues Presented by the Complaint.**

On September 27, 1963, Mr. Ming, attorney for the plaintiffs, in explaining to the Court the issues presented by the complaint, in part stated:

> "I think the Court will recognize that construction work being what it is, i.e., performance of a contract by which the work having been done the contract terminates. That unless we are provided with equitable relief and prompt equitable relief the rights of these plaintiffs which are the rights under the contract to be hired and to be trained will be dissipated upon performance of the contract." (Tr. 11.)

The Court inquired:

> "How close is the contract to being performed?"

Mr. Ming:

> "I could tell the Court on the basis of investigation not completed until after the complaint had been drawn that we seem to be within less than thirty days of the completion of this craft aspect of the performance." (Tr. 12.)

Mr. Ming:

> "So that further in aid of our application for equitable relief we point out to the Court what we are really seeking to do is to invoke the Courts of the United

States to enforce the contract, the terms of which, in turn, specifically contain the statement of policy of the United States. . . ." (Tr. 13.)

Mr. Ming:

"They are citizens of the United States. They seek to assert rights provided for them in a contract between the United States and private persons and we ask the Court, and we have suggested in our prayer for relief that the Court either restrain continued performance of the contract until the rights of the plaintiffs are provided, require that they be provided and restrain performance until they are provided or that the Court require the parties not to pay or accept money in connection with performance of the contract." (Tr. 14, 15.)

On September 27, 1963, during a preliminary discussion of the issues before the District Court, the Court was advised by Bethlehem that there was only about two weeks to one month more of work, that Bethlehem was cutting down their operations and that Bethlehem was having their "topping" ceremonies on September 27. The Court remarked "The matter is practically concluded and I think this is an emergency and should be treated as such." (Tr. 24, 25.)

On October 2, 1963, the District Court was advised by Bethlehem that the subcontract of Bethlehem provides that all work shall be completed by October 18, 1963, and that Bethlehem will be able to complete all of the work on or before that date and that when Bethlehem finishes its work the Union will have finished its work on the building. Bethlehem further advised that there were only 68 journeymen structural iron workers employed in the erection work (as contrasted with 128 in June, 1963) and that this number will dwindle almost every day between now and October 18. (Tr. 66, 67.)

On October 11, 1963, Bethlehem advised the Court (Tr. 849, 850) as follows:

> "The uncontradicted evidence in the record is that Bethlehem is not employing men on this project. There are only two apprenticed iron workers on the job at the present time. There are only 64 journeymen iron workers. Three of the four huge derricks have been dismantled, and lowered to the ground. There is one huge derrick there today, but it will be lowered to the ground either this afternoon or Monday of next week.
>
> "So the question is really moot, so far as the defendant Bethlehem is concerned. We are just not employing anyone to complete the structural steel work on the new building, because Bethlehem plans to complete all of its work before the contract termination date, which is, October 18, or Friday of next week. Then it is contemplated that there will be no employee of Bethlehem working on the project, except perhaps for one or two clean up men, as they call it in the trade."

(On October 15, 1963, erection of the steel superstructure of the court house was delayed for several days because of an inquest by the coroner of Cook County of a journeyman structural iron worker, employed by Bethlehem, who accidentally fell to his death from the 30th floor of the building).

On October 22, 1963, Bethlehem advised the District Court that all work of Bethlehem on the site in question would be concluded the following day and that Bethlehem intended to recite that fact in its motion to amend the findings of fact and in its motion for a new trial. The Court replied: "Very well, the record may so show." (Tr. 9.)

On October 25, 1963, in support of its motion to amend findings of fact, for a new trial and to dimiss Bethlehem as a party defendant, Bethlehem filed the affidavit of C. W. Pitchford, executed October 24, 1963. Mr. Pitchford is employed as Manager of Erection, Western District, Beth-

lehem Steel Company, and supervised the erection of steel at the new federal court house building in Chicago.

The affidavit stated that all of the work of Bethlehem Steel Company called for in its subcontract with respect to Contract No. GS-5PC-1178 was completed on Wednesday, October 23, 1963, that no journeymen iron workers or apprentice iron workers are employed on said building site by Bethlehem and that Bethlehem had no employees working on said building site.

The affidavit further stated that Bethlehem Steel Company had no other construction job or steel erection job in the City of Chicago, that the plant of Bethlehem located at 8301 South Stewart Avenue is a steel fabricating plant, that in the process of fabricating steel it does not employ any journeymen iron workers or any apprentice iron workers, that the exclusive collective bargaining agent for production workers at the Stewart Avenue plant of Bethlehem is United Steel Workers of America.

The affidavit further stated that the only other plant of Bethlehem Steel Company located in the Chicago area is the Clearing warehouse located in the Clearing District, Chicago, Illinois, that wire rope, reinforcing bars and other materials of steel are stored in said warehouse, that no journeymen iron workers or apprentice iron workers are employed in said warehouse, that the sole collective bargaining agent for the employees working in the Clearing warehouse is United Steel Workers of America.

No counter-affidavit was filed.

As of this writing, September 4, 1964, Bethlehem has no erection contract in Chicago requiring the employment of journeyman iron workers or iron worker apprentices.

The Court of Appeals for the 7th Circuit in its opinion, 332 F. 2d 243, 246, stated:

"On October 25, 1963, Bethlehem filed affidavits with the trial court that all work in fulfillment of its subcontract on the construction site was completed on October 23, 1963. No one disputed that such was the fact.

"On November 8, 1963, the trial court filed its comprehensive findings of fact, conclusions of law and draft of preliminary injunction and adopted them as its own and ordered them entered *nunc pro tunc* as of October 16, 1963.

"In sum, the findings recited the factual history of the case; that there had been no discrimination against plaintiffs by Contractor or Bethlehem; . . ."

The labor agreement between Bethlehem and the International Association of Iron Workers required that Bethlehem obtain all of its journeymen iron workers in the Chicago area through Chicago Local No. 1 (Tr. 752, 753) and that all iron worker apprentices be indentured as apprentices and be obtained through the Joint Committee.

C.

**Plaintiffs' Exhibits in Evidence.**

Plaintiffs' Exhibit 18 in evidence stated:

BETHLEHEM STEEL COMPANY.
Chicago 20, Ill.

June 28, 1963.

*Chicago Structural Iron Workers,*
*Joint Apprenticeship Committee,*
*2405 W. North Avenue,*
*Chicago 47, Illinois.*

GENTLEMEN:

On Monday, June 24, Superintendant Perkins on the GSA Building, Chicago, Illinois, interviewed Messrs. Michael Corcoran, Ronald Todd, and James Hill, Jr., applicants for work as apprentices.

We are in a position to give two of these applicants immediate employment on the GSA Building if you can have them indentured as apprentices in the Apprenticeship Training Program of the Joint Apprenticeship Committee of the Associated Steel Erectors of Chicago, Illinois and the International Association of Bridge, Structural and Ornamental Ironworkers, Local Union No. 1.

We request your fullest cooperation in this matter.

Very truly yours,

BETHLEHEM STEEL COMPANY,

.....

C. W. PITCHFORD,
*Manager of Erection Western District.*

CWP/as
cc: PASCHEN CONTRACTORS, INC.,
221 S. Bearborn Street,
Chicago 4, Illinois.
MR. DOMINIC TESAURO,
General Services Admin.,
219 S. Clark St.,
Chicago 4, Illinois.
MR. G. P. ADAIR.

Plaintiffs' Exhibit 21 in evidence stated:

JOINT APPRENTICESHIP COMMITTEE
OF THE
ASSOCIATED STEEL ERECTORS OF CHICAGO
AND
INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL AND ORNAMENTAL IRONWORKERS
LOCAL UNION NO. 1.

July 2, 1963

*Mr. C. W. Pitchford,*
*Manager of Erection Western District,*
*Bethlehem Steel Company,*
*8301 South Stewart Avenue,*
*Chicago 20, Illinois.*

DEAR MR. PITCHFORD:

In reply to your letter of June 28, 1963, regarding the employment of apprentices on the GSA Building in Chicago.

The applicants you mention in your letter have filed their applications with the Committee and are now being processed. However, we do have many qualified applicants on file that have been waiting a great length of time to be called to start an apprenticeship in this craft.

May we suggest to you that if your Superintendent requires additional apprentices, he contact the writer and we will be glad to furnish them from either indentured apprentices or our waiting group.

Sincerely yours,

EDMUND D. FLOOD,
Edmund D. Flood,
*Co-Ordinator.*

Plaintiffs' Exhibit 24 in evidence in part stated:

BETHLEHEM STEEL COMPANY.
(Incorporated)

Chicago 20, Ill.

July 12, 1963

*Chicago Structural Iron Workers,*
*Joint Apprenticeship Committee,*
*2405 W. North Avenue,*
*Chicago 47, Illinois.*

GENTLEMEN:

On Monday, June 24, Superintendent Perkins on the GSA Building, Chicago, Illinois, interviewed Messrs. Michael Corcoran, Ronald Todd, and James Hill, Jr., applicants for work as Structural Iron Worker Apprentices.

Bethlehem Steel Co. requests your immediate certification of two of these applicants as indentured Structural Iron Worker Apprentices. We further request that following such certification, they be referred to us for employment at the GSA Building, Chicago, Illinois.

Very truly yours,

BETHLEHEM STEEL COMPANY.

.....

C. W. PITCHFORD,
*Manager of Erection, Western District.*

CWP/as
CC: PASCHEN CONTRACTORS, INC.,
221 S. Dearborn Street,
Chicago 4, Illinois.

MR. DOMINIC TESAURO,
General Services Administration,
219 South Clark Street,
Chicago 4, Illinois.

Plaintiffs' Exhibit 24 in evidence in part stated:

BETHLEHEM STEEL COMPANY.
(Incorporated)
Chicago 20, Ill.

July 12, 1963

*Mr. Dominic Tesauro,*
*GSA Administrator,*
*219 S. Clark Street,*
*Chicago 4, Illinois.*

DEAR MR. TESAURO:

Attached is a copy of a letter which I mailed to the Chicago Structural Ironworkers Joint Apprenticeship Committee.

This will confirm our statement to Mr. Flood which was made in the meeting held in your office on July 10, 1963 that Bethlehem Steel Co. will immediately hire two of these applicants on the GSA Building in Chicago when they have been certified as indentured Structural Ironworker Apprentices.

Very truly yours,

BETHLEHEM STEEL COMPANY.
C. W. Pitchford,
*Manager of Erection, Western District.*

CWP/as
Enc.
CC: PASCHEN CONTRACTORS, INC.,
221 S. Dearborn Street,
Chicago 4, Illinois.

Plaintiffs' Exhibit 25 in evidence stated:

JOINT APPRENTICESHIP COMMITTEE
OF THE
ASSOCIATED STEEL ERECTORS OF CHICAGO
AND
INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL AND ORNAMENTAL IRONWORKERS
LOCAL UNION No. 1.

( Rubber Stamp )
( Dominic A. Tesauro )
( Regional Administrator )

July 15, 1963

*Mr. C. W. Pitchford,*
*Manager of Erection, Western District,*
*Bethlehem Steel Company,*
*8301 South Stewart Avenue,*
*Chicago 20, Illinois.*

DEAR MR. PITCHFORD:

Re: your letter of July 12, 1963.

Your request for immediate assignment of two of the three applicants for apprenticeship listed in your letter, does not follow the normal practices of securing apprentices thru our Committee. May I refer you to my letter of July 2, 1963, in which I suggested that in the event your Superintendent required additional apprentices we will be glad to furnish them from either indentured apprentices or from our waiting groups.

Sincerely yours,

Edmund D. Flood,
*Co-Ordinator.*

Plaintiffs' Exhibit 26, a letter from the attorney for GSA in Chicago, stated:

FAIR EMPLOYMENT OFFICER.—BRF
Washington, D. C.

July 19, 1963

Deputy Contracts Compliance Officer—5L
5CSL

Court house and Federal Office Building, Chicago, Ill., Local Union No. 1, International Association of Bridge, Structural and Ornamental Ironworkers.

Bethlehem Steel Company is the subcontractor for the structural steel work on the subject project. Bethlehem has a union contract with the International Association of Bridge, Structural and Ornamental Ironworkers, but does not have a contract with Local Union No. 1 which is the Structural Ironworkers' Union in Chicago. However, we are informed by Bethlehem that under its contract with the International, it is required to use union labor from the local union in whatever geographic area a job is in progress, which means Local Union No. 1 in Chicago.

The attached summary with exhibits referred to therein covers the action we have taken in endeavoring to have negro apprentices employed by Bethlehem on the F. O. B. project. We concentrated on employment of apprentices because after much effort it was found that there were no qualified negro journeymen in the Chicago area who were interested in this work.

It will be noted that Bethlehem Steel is perfectly willing to employ the apprentices, and has requested the Joint Apprenticeship Committee to approve certain applications from negroes in order that this can be done. The reply dated July 15, 1963, from the Apprenticeship Committee, refusing the request of Bethlehem Steel, is consistent with the attitude of the Committee and of the Local Union No. 1, which we have found prevalent from the inception of our efforts to have negroes hired on the F. O. B. job.

Inasmuch as this is now a matter of failure on the part of the union to cooperate and we have exhausted all means of persuasion and negotiation at our command, it is felt that this matter should now be reported to the President's Committee for such action as may be appropriate.

HUGH H. BRISTER.

cc: HHBrister—5L
DATesauro—5A
Official File—5CSL
HHBrister/fml

A reply from the special counsel of the Fair Employment Practices Committee, plaintiffs' Exhibit 27 in evidence, dated September 23, 1963, was addressed to Mr. Tesauro, GSA Administrator in Chicago, and in part stated:

> "Under the circumstances, action against Bethlehem would not appear appropriate at this time. I would also suggest deferring any meeting of ironwork contractors on the matter of apprenticeship until the President's Committee acts on the proposed Standards for Determining Contractor Compliance."

D.

**Findings of Fact and Conclusions of Law.**

On October 16, 1963, the District Court orally made findings of fact, conclusions of law and entered its decree. The Court then instructed the attorney for the plaintiffs to formalize these findings, conclusions of law and the decree.

On November 8, 1963, the District Court entered *nunc pro tunc* as of October 16, 1963 its findings of fact, conclusions of law and preliminary injunction.

The findings of fact dated November 8, 1963, and entered *nunc pro tunc* as of October 16, 1963, in part state:

> "24. On or about June 24, 1963, the plaintiffs were

examined by a representative of Bethlehem and found to be qualified to be hired as apprentice iron workers.

"25. On the same day each of the plaintiffs executed an application for indenture as an apprentice iron worker and each application together with the applicant's birth certificate and references was duly filed with the Joint Committee.

"26. On or about June 28, 1963, Bethlehem stated that it was in a position to give two of the plaintiffs immediate employment on the United States Court House and office building in Chicago if they were indentured by the Joint Committee and requested the Joint Committee to indenture two of the plaintiffs.

"27. None of the plaintiffs has been so indentured or submitted to Bethlehem for employment, or even examined by the Joint Committee.

• • • • •

"49. There has been no discrimination by Bethlehem against the plaintiffs or members of the class on account of their race."

The conclusions of law attached to the findings of fact dated November 8, 1963, and entered *nunc pro tunc* as of October 16, 1963, in part state:

"15. Plaintiffs are entitled to a preliminary injunction requiring the defendant Bethlehem to accept for employment as apprenticeship Iron Workers when they have been properly certified by the Union and Joint Committee, the plaintiffs, Ronald L. Todd and James Hill."

The decree of preliminary injunction dated November 8, 1963, and entered *nunc pro tunc* as of October 16, 1963, in part provides:

"3. That the defendant, Bethlehem Steel Company, employ as apprentice iron workers the said plaintiffs, Ronald L. Todd and James Hill, upon their certification as indentured apprentice iron workers and admission to the Union as apprentice iron workers."

The opinion of the District Court in the case at bar was rendered on October 16, 1963, *Todd, et al.* v. *Joint Apprenticeship Committee, etc., et al.*, 223 F. Supp. 12. The Court in part stated:

> "Bethlehem did, however, express a willingness to hire Todd and Hill as apprentice iron workers subject to their being properly indentured and presented by the Union. This fact was made known by Bethlehem to the Union and to the Joint Committee. All three plaintiffs did, also during the latter part of June, 1963, fill out apprenticeship training applications with the Joint Committee. None of the three were or have been indentured and/or submitted to Bethlehem for employment." (p. 15.)
>
> • • • • •
>
> "Needless to say he [Tesauro, GSA] could not require them, or more specifically in this instance Bethlehem Steel, to hire non-union help. Such a suggestion would require Bethlehem to breach their collective bargaining contract with the Union." (p. 21.)
>
> • • • • •
>
> "It is equally clear on the basis of the evidence and the law of the case that the defendant Bethlehem has not been guilty of any act or acts of discriminatory conduct against either the named plaintiffs or for that matter any un-named members of the plaintiffs' class. However, for the purpose of and only for the purpose of rendering a complete and total decree I cannot dismiss but must retain jurisdiction over Bethlehem Steel." (p. 23.)
>
> • • • • •
>
> "It is hereby further ordered, adjudged and decreed that the defendant Bethlehem Steel Company employ as Apprentice Iron Workers the said Todd and Hill upon their certification and admission as aforesaid." (p. 23.)

On November 8, 1963, the District Court entered an order stating that

> "The motions of defendant Bethlehem Steel Company to have the Court receive in evidence additional affidavits, to amend and alter the Court's findings of fact and conclusions of law and to dismiss Bethlehem Steel Company are each and all denied."

This order was not entered *nunc pro tunc.*

The motion for judgment for defendant Bethlehem at the close of all the evidence in part stated: "The issues are moot with respect to Bethlehem Steel Company."

Defendant Bethlehem filed its separate notice of appeal to the United States Court of Appeals for the Seventh Circuit. Before briefs on the merits were filed, defendant Bethlehem filed with the Court of Appeals its motion to dismiss because of mootness. The Court of Appeals granted the motion, vacated the judgment and decree of the District Court and remanded the case to that Court with directions to dismiss the complaint as to all defendants as moot.

The Court of Appeals stated, 332 F. 2d 243, 246, 7:

> "Our study of the record convinces us that plaintiffs, by this action, sought to enjoin defendants from proceeding with the performance of Contract No. GS-5PC-1178 unless and until they were regularly employed as iron worker apprentices by Bethlehem on this construction site; or, in the alternative, restraining further payments to or by Contractor and Bethlehem until such employment was granted.
>
> "Bethlehem completed all work on its subcontract on October 23, 1963. At the time the preliminary injunction was entered on November 8, 1963, even though *nunc pro tunc* as of October 16, 1963, the matter in controversy had become moot. Bethlehem had no other steel erection activities in the Chicago area.
>
> • • • • •
>
> "In the instant case, we have before us merely a temporary injunction applicable only to the specific construction project to which it is addressed.
>
> • • • • •

"We follow the established practice of the Supreme Court that when an issue or controversy becomes moot prior to or during an appeal that all prior orders should be vacated and the cause remanded with instructions to dismiss. *Brotherhood of Railroad Trainmen* v. *Chicago & I. M. R. Co.*, 375 U. S. 18, 84 S. Ct. 61, 11 L. Ed. 2d 39 (1963)[2]; *Davis* v. *Soja*, 374 U. S. 495, 83 S. Ct. 1863, 10 L. Ed. 2d 1043 (1963).[3]

• • • • •

"2. Reported below: 315 F. 2d 171 (7 Cir.).
"3. Reported below: 303 F. 2d 601 (7 Cir.)."

## ARGUMENT.

The judgment of the Court of Appeals is correct. The petition should be denied.

The Court of Appeals in its opinion stated, 332 F. 2d 243, 247:

> "The subject matter of the litigation is no longer an actual controversy. The time for determination of the questions involved in this case has passed. No relief within the scope of the complaint could now be granted."

The issues formed by the complaint are moot. In *United States* v. *Munsingwear,* 340 U. S. 36, 39, this Court stated:

> "The established practice of the Court in dealing with a civil case from a court in the federal system which has become moot while on its way here or pending our decision on the merits is to reverse or vacate the judgment below and remand with a direction to dismiss."[2]

Footnote 2 contains a long list of cases wherein the Court has vacated the judgment below and remanded with a direction to dismiss because the cases were moot.

In accord are *Brotherhood of Railroad Trainmen* v. *Chicago & I. M. R. Co.,* 84 S. Ct. 61 and *Davis* v. *Soja,* 83 S. Ct. 1863.

The attorney for plaintiffs admitted, in explaining the issues to the District Court, that when the work called for in the contract has been performed "the contract terminates" (Tr. 11); that the "rights of these plaintiffs which are rights under the contract to be hired and to be trained will be dissipated upon performance of the contract." (Tr. 11.) The trial court knew on the day after the complaint

was filed that there was less than 30 days for the completion of the contract. (Tr. 12.)

The attorney for plaintiffs admitted also that "what we are really seeking to do is to invoke the courts of the United States to enforce the contract. . . ." (Tr. 13.)

Plaintiffs clearly predicated liability of Bethlehem solely on the provisions of the contract. The undisputed evidence shows that the contract was completed on October 23, 1963; that after that date no journeyman iron worker or apprenticed iron worker was employed on said building site by Bethlehem and that Bethlehem had no other steel erection job in the City of Chicago for the employment of apprenticed iron workers.

Plaintiffs urge that the petition should be granted because the decision of the Court of Appeals is in conflict with *Carpenters Union* v. *Labor Board,* 341 U. S. 707. In that case the trial examiner, the Labor Board, the Court of Appeals for the Sixth Circuit and this Court found that there was a *continuing violation* of the Labor Management Relations Act of 1947 which should be declared illegal by a cease and desist order. The Court of Appeals in that case, 181 F. 2d 126, 131, stated:

> "Inasmuch as the strike was a continuing one, the Labor Management Relations Act of 1947 is being given no retroactive effect when held applicable to the case at bar.
>
> * * * * *
>
> "The Labor Board based its finding that respondents were violating section 8(b)(4)(A), not upon their actions before the effective date of the Taft-Hartley Act, but in their keeping the strike order in effect after that amendatory Act of Congress became operative. As has been indicated in the foregoing discussion, we think this interpretation was correct."

This Court in its opinion in *Carpenters Union* v. *Labor Board*, 341 U. S. 707, 714, quoted with approval the Labor Board's decision which concluded:

> "'Nor is it material . . . that the labor dispute had its origin before the effective date of the amended Act, for we are convinced that it was continued and prolonged after the effective date by the very same factors which originally created it and for the same original objective which, as found above, Section 8(b)(4)(A) declares unlawful. Thus, at material times both before and after the effective date of the amendments . . . (2) the Respondents' [here petitioners] strike order, which admittedly was never rescinded, was outstanding and effectively prevented the carpenters from officially working on the job as long as Watson's men were also working; . . .' 80 N. L. R. B. at 537-538."

The *Carpenters Union* case is not in conflict with the decision of the Court of Appeals in the case at bar because there was no *continuing discrimination* against plaintiffs by Bethlehem. The District Court found as a fact that there was no discrimination by Bethlehem in the first place. Finding of Fact No. 49 stated:

> "49. There has been no discrimination by Bethlehem against the plaintiffs or members of the class on account of their race."

The opinion of the District Court, 223 F. Supp. 12, stated:

> "Needless to say he [Tesauro, GSA] could not require them, or more specifically in this instance Bethlehem Steel, to hire non-union help. Such a suggestion would require Bethlehem to breach their collective bargaining contract with the Union." (p. 21)
>
> * * * * *
>
> "It is equally clear on the basis of the evidence and the law of the case that the defendant Bethlehem has not been guilty of any act or acts of discriminatory

> conduct against either the named plaintiffs or for that matter any un-named members of the plaintiffs' class. However, for the purpose of and only for the purpose of rendering a complete and total decree I cannot dismiss but must retain jurisdiction over Bethlehem Steel." (p. 23)

It is clear that the issues against Bethlehem as limited by the complaint are moot. There is no *continuing* discrimination by Bethlehem. There never was *any* discrimination.

Plaintiffs also claim that the judgment of the Court of Appeals in the case at bar is in conflict with *Federal Trade Commission* v. *Goodyear Tire & Rubber Company,* 304 U. S. 257 (May 16, 1938). In that case this Court held that the amendment of June 16, 1936 to Section 2 of the Clayton Act permitting price discriminations based upon quantities sold was not intended to affect orders of the Federal Trade Commission issued before the effective date of the amendment. The Court further held that abandonment of a price arrangement found illegal and ordered discontinued by the Federal Trade Commission does not deprive the respondent of the right to have the legality of the practice and validity of the order determined on review by the Court of Appeals. Thus the controversy does not become moot.

The argument that the *Goodyear* case is in conflict with the decision of the Court of Appeals in the case at bar loses its force when, as this Court noted, *Trade Commission* v. *Goodyear Company,* 304 U. S. 257, 259:

> "The provisions of the Act of June 19, 1936, show clearly that the orders of the Commission entered before its passage are to remain in effect. Section 2 of that Act provides that nothing therein contained shall 'affect rights of action arising, or litigation pending, or orders of the Federal Trade Commission issued

> and in effect or pending on review, based on section 2 of said Act of October 15, 1914, prior to the effective date of this amendatory Act.' "

The Federal Trade Commission, like the Labor Board, is authorized by statute to issue cease and desist orders. Discontinuance of the illegal practice by Goodyear did not render the controversy moot. The order of the Federal Trade Commission directing Goodyear to cease and desist from the particular discriminations described in the order is a *continuing* order contemplated by the statute. The Commission should not be required to try the case *de novo* in the event that the particular discriminations were resumed at some future date.

The *Goodyear* case is not in conflict with the decision of the Court of Appeals in the case at bar. As heretofore observed, there was no original discrimination by Bethlehem against plaintiffs on account of their race. There could be no *continuing* discrimination.

The question presented by the petition is not important. The decision of the Court of Appeals in the case at bar turns upon the special facts and limited issues presented by the complaint and will affect few others than the litigants. There never was any employment relation between the plaintiffs and Bethlehem. That lack of employment relation was not the result of discrimination by Bethlehem.

The complaint did not allege and the evidence did not prove a true class action. *Clark* v. *Thompson*, 204 F. Supp. 30, 206 F. Supp. 539, 313 F. 2d 637, cert. denied 84 S. Ct. 440; *Brown* v. *Board of Trustees of LaGrange*, 187 F. 2d 20.

The evidence in this case and the findings of fact show clearly that plaintiffs never had a cause of action against Bethlehem. The complaint should be dismissed for want of equity. *Brown* v. *Board of Trustees of LaGrange*, 187 F. 2d 20, 25.

The complaint should be dismissed also because plaintiffs failed to exhaust their administrative remedies. Bethlehem in its answer to the complaint, Paragraph 6, stated:

> "Defendant states that the plaintiffs have a remedy at law in that plaintiffs may file a complaint before the President's Committee on Equal Employment Opportunity established pursuant to the Executive Order upon which the plaintiffs rely. Section 60-1.21 of the rules and regulations adopted by the President's Committee reads as follows:
>
> " 'Who may file complaints.—Any employee of any contractor or subcontractor or applicant for employment with such contractor or subcontractor who believes himself to be aggrieved under the equal opportunity clause may, by himself or by an authorized representative, file in writing a complaint of alleged discrimination. Such complaint must be filed not later than 90 days from the date of the alleged discrimination, unless the time for filing is extended by the agency or the Executive Vice Chairman upon good cause shown.'
>
> "Plaintiffs may also file a complaint under the Fair Employment Practices Act of the State of Illinois and may obtain judicial enforcement of any order of the Commission established by that Act."

Plaintiffs admitted on cross-examination that they had not exhausted their administrative remedies either before the President's Committee or before the Illinois Commission on Fair Employment Practices. (Tr. 518, 549, 564.) Exhaustion of administrative remedies is required before plaintiffs may seek the aid of a federal District Court on account of alleged violations of the Executive Orders with respect to race discrimination. *Farmer* v. *Philadelphia Electric Company*, 215 F. Supp. 729, U. S. D. Ct., E. D. Pa., 32 L. W. 1141, 2464 (March 12, 1964). In this case the Court of Appeals stated:

"We believe that the doctrine of 'exhaustion of administrative remedies' should at least be applied here, and that plaintiff be required to file a complaint with an appropriate contracting agency or with the President's Committee before being permitted to seek the aid of a Federal district court. However, whether a district court could then entertain jurisdiction is not here decided."

## CONCLUSION.

The petition should be denied. The issues as formed by the complaint are moot. This case should be remanded to the District Court, the judgment and decree of that Court should be vacated and that Court should be directed to dismiss the complaint against Bethlehem as moot

Respectfully submitted,

PAUL R. CONAGHAN,
*Attorney for Bethlehem Steel Company, Respondent.*

STEVENSON, CONAGHAN, HACKBERT,
ROOKS and PITTS,
*Of Counsel.*

## APPENDIX.

IN THE UNITED STATES DISTRICT COURT.

For the Northern District of Illinois,

Eastern Division.

Ronald L. Todd and Michael Cochran by his parents and next friends, Ulysses Cochran and Patricia Cochran, and James Hill, *Plaintiffs*,

*vs.*

Joint Apprenticeship Committee of the Steel Workers of Chicago and International Association of Bridge, Structural and Ornamental Iron Workers Local Union No. 1, Sidney I. Cole, Chairman, Frank D. Reiland, Treasurer, A. Walter Becker, Thomas Cannon, James Eads, Joseph Frankovic, Stanford Jacobs, and Edmund D. Flood, Apprentice Co-Ordinator, Iron Workers Bridge and Structural Union, Local No. 1, Steve Zakula, President, Frank Pauley, Secretary-Treasurer, Joseph Frankovic, Job Representative, and Edmund D. Flood, Apprentice Co-Ordinator, Iron Workers District Council of Chicago & Vicinity, Leslie L. Myers, President, Robert Benson, Secretary and William Knapp, Vice-President; Paschen Contractors, Inc., a Delaware corporation; Peter Kiewit Sons' Co., a Nebraska corporation; Bethlehem Steel Company, a Delaware corporation; and Dominic Tesauro, Regional Administrator, General Services Administration, *Defendants*.

No. 63-C-1739

### COMPLAINT.

Now come Ronald L. Todd and Michael Cochran, by his parents and next friends, Ulysses Cochran and Patricia

Cochran, and James Hill, all residents and citizens of the State of Illinois and of the United States of America by William R. Ming, Jr., and George N. Leighton, their attorneys, complaining of Joint Apprenticeship Committee of the Steel Workers of Chicago and International Association of Bridge, Structural and Ornamental Iron Workers Local Union No. 1, Sidney I. Cole, Chairman, Frank D. Reiland, Treasurer, A. Walter Becker, Thomas Cannon, James Eads, Joseph Frankovic, Stanford Jacobs, Edmund D. Flood, Apprentice Co-Ordinator; Iron Workers Bridge and Structural Union, Local No. 1, Steve Zakula, President, Frank Pauley, Secretary-Treasurer, Joseph Frankovic, Job Representative, and Edmund D. Flood, Apprentice Co-Ordinator; and Iron Workers District Council of Chicago & Vicinity, Leslie L. Myers, President, Robert Benson, Secretary and William Knapp, Vice-President, all of which organizations and individuals are sometimes collectively referred to hereinafter as the Union; Paschen Contractors, Inc., a Delaware corporation, and Peter Kiewit Sons' Co., a Nebraska corporation, hereinafter referred to as Contractors; Bethlehem Steel Company, a Delaware corporation, hereinafter referred to as Sub-Contractor; and Dominic Tesauro, Regional Administrator of the General Services Administration, hereinafter referred to as Administrator, hereby invoke the jurisdiction of this Court under the provisions of Title 28 U. S. C., Section 1331, in that the matter in controversy arises under the constitution and laws of the United States and the amount in controversy is in excess of $10,000.00. For cause of action plaintiffs allege:

1. On or about October 26, 1962, by Contract No. GS 5PC-1178 Contractors undertook and agreed to construct a United States Courthouse and Federal Office Building in Chicago, Illinois. One of the provisions of that contract was as follows:

"In connection with the performance of work under this contract, the Contractor agrees as follows:

(a) The Contractor will not discriminate against any employee or applicant for employment because of race, creed, color or national origin. The Contractor will take affirmative action to ensure that applicants are employed, and that employees are treated during employment without regard to their race, creed, color, or national origin. Such action shall include, but not be limited to, the following: employment, upgrading, demotion or transfer; recruitment or recruitment advertising; layoff or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeship. The Contractor agrees to post in conspicuous places, available to employees and applicants for employment, notices to be provided by the Contracting Officer setting forth the provisions of this Nondiscrimination clause.

(b) The Contractor will, in all solicitations or advertisements for employees placed by or on behalf of the Contractor, state that all qualified applicants will receive consideration for employment without regard to race, creed, color, or national origin.

(c) The Contractor will send to each labor union or representative of workers with which he has a collective-bargaining agreement or other contract or understanding, a notice, to be provided by the agency Contracting Officer, advising the said labor union or workers' representative of the Contractor's commitments under this Nondiscrimination clause, and shall post copies of the notice in conspicuous places available to the employees and applicants for employment.

(d) The Contractor will comply with all provisions of Executive Order No. 10925 of March 6, 1961, and of the rules, regulations, and relevant orders of the President's Committee on Equal Employment Opportunity created thereby.

(e) The Contractor will furnish all information and reports required by Executive Order No. 10925 of March 6, 1961, and by the rules, regulations, and orders of the said Committee, or pursuant thereto, and will

permit access to his books, records, and accounts by the contracting agency and the Committee for purposes of investigation to ascertain compliance with such rules, regulations, and orders.

(f) In the event of the Contractor's noncompliance with the Nondiscrimination clause of this contract or with any of the said rules, regulations, or orders, this contract may be canceled in whole or in part and the Contractor may be declared ineligible for further Government contracts in accordance with procedure authorized in Executive Order No. 10925 of March 6, 1961, and such other sanctions may be imposed and remedies invoked as provided in the said Executive order or by rule, regulations, or order of the President's Committee on Equal Employment Opportunity, or as otherwise provided by law.

(g) The Contractor will include the provisions of the foregoing paragraphs (a) through (f) in every subcontract or purchase order unless exempted by rules, regulations, or orders of the President's Committee on Equal Employment Opportunity issued pursuant to section 303 of Executive Order No. 10925 of March 6, 1961, so that such provisions will be binding upon each subcontractor or vendor. The Contractor will take such action with respect to any subcontract or purchase order as the contracting agency may direct as a means of enforcing such provisions, including sanctions for noncompliance: *Provided, however,* that in the event the Contractor becomes involved in, or is threatened with, litigation with a subcontractor or vendor as a result of such direction by the contracting agency, the Contractor may request the United States to enter into such litigation to protect the interests of the United States."

Another provision was as follows:

"Apprentices will be permitted to work only under a bona fide apprenticeship program registered with a State Apprenticeship Council which is recognized by the Federal Committee on Apprenticeship, U. S. Department of Labor; or if no such recognized Council

exists in a State, under a program registered with the Bureau of Apprenticeship, U. S. Department of Labor."

At all times material herein there was in full force and effect in the State of Illinois, a bona fide apprenticeship program for iron workers which had been approved by the United States Department of Labor on September 30, 1952.

2. Under the provisions of the said iron workers apprenticeship program the only requirements for apprentices are:

"A. Applicants for apprenticeship shall not be less than eighteen (18) years of age nor more than thirty (30) years of age, have a pronounced aptitude and interest in this craft and be physically able to perform the required work.

B. They shall be American citizens or make declarations to become same, or Canadian citizens within the Dominion of Canada.

C. They shall provide proof of their age.

D. They shall keep such records of their apprenticeship training as may be required by the Committee."

3. Plaintiffs Ronald L. Todd, Michael Cochran and James Hill are twenty-three (23), twenty (20) and twenty-one (21) years of age respectively, and having been born in the United States, plaintiffs are citizens of the United States. They belong to the ethnic group commonly designated as Negroes. Plaintiffs and each of the persons who constitute the class to which plaintiffs belong have a pronounced aptitude and interest in the iron workers craft and are physically able to perform the required work. Each plaintiff provided proof of his age to the Iron Workers' Joint Apprenticeship Committee on or about the 12th day of June, 1963, and has demonstrated that he satisfies the minimum standards of education and experience for apprenticeship under the said apprentice program. Said Committee refused to certify plaintiffs as apprentices solely

because of their race and color. Plaintiffs and each of the persons of the class to which plaintiffs belong are persons who are either without financial means or of limited financial ability to bear the necessary costs and expenses of these proceedings. Defendants, on the other hand, are corporations, associations and individuals, who own and control vast sums of resources and assets.

4. In April 1963 plaintiffs and each of them sought employment by the Sub-Contractor as an apprentice iron worker. Notwithstanding the application and qualifications of plaintiffs and each of the persons similarly situated, Bethlehem Steel Company has failed and refused to employ these persons or any of them to work on the project covered by Contract No. GS-5PC-1178 solely because of their race and color. For the same reason the Sub-Contractor has refused to employ any person as a structural iron worker who is a Negro. Moreover, though Contractors well-know all of the facts alleged herein to be true, Contractors have failed and refused to take action, affirmative or otherwise to cause employment of plaintiffs.

5. The provisions of the contract quoted hereinabove were entered into for the benefit of plaintiffs and persons similarly situated. Plaintiffs are members of a class of persons who, being residents and citizens of the United States, commonly designated as Negroes, are and have been for many years objects and victims of discrimination in employment and exclusion from certain classes and crafts of employment of which the craft of structural iron workers is one. The size of this class is so great and the number of persons so numerous that it would not be practicable for all such persons to join in this action. Plaintiffs therefore bring this action on their own individual behalf and on behalf of that class.

6. All of the defendants herein well know the truth of the allegations contained herein. Notwithstanding the aforesaid, none of the defendants has secured enforcement of the rights of the plaintiffs or the class they represent under the terms of Contract No. GS-5PC-1178. The plaintiffs have no remedy at law which would be adequate.

7. On or about the 6th day of March, 1961, the President of the United States issued Executive Order No. 10925, which provides, in part:

> "Whereas discrimination because of race, creed, color, or national origin is contrary to the Constitutional principles and policies of the United States; and
>
> Whereas it is the plain and positive obligation of the United States Government to promote and ensure equal opportunity for all qualified persons, without regard to race, creed, color, or national origin, employed or seeking employment with the Federal Government and on government contracts; and
>
> Whereas it is the policy of the executive branch of the Government to encourage by positive measures equal opportunity for all qualified persons within the Government; and
>
> Whereas it is in the general interest and welfare of the United States to promote its economy, security, and national defense through the most efficient and effective utilization of all available manpower; . . ."

Wherefore, the plaintiffs respectfully pray this Court to enjoin the defendants and each of them from proceeding with the performance of Contract No. GS-5PC-1178 unless and until plaintiffs and each of them is duly and regularly employed as an iron workers apprentice or in the alternative that this Court enjoin and restrain the defendants and each of them from making or receiving any payments on

account of such contract unless and until plaintiffs and each of them is duly and regularly employed as an iron workers apprentice.

Ronald L. Todd and Michael Cochran, by his parents and next friends, Ulysses Cochran and Patricia Cochran, and James Hill,

*Plaintiffs.*

By .....

William R. Ming, Jr.,
George N. Leighton,
*Of Counsel.*

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JOHN F. DAVIS, CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1964.

**No. 380**

RONALD L. TODD, et al.,

*Petitioners,*

*vs.*

JOINT APPRENTICESHIP COMMITTEE, ETC., and BETHLEHEM STEEL COMPANY, and LOCAL UNION NO. 1, ETC., ET AL.,

*Respondents.*

**BRIEF FOR RESPONDENTS, JOINT APPRENTICESHIP COMMITTEE OF THE STEEL WORKERS OF CHICAGO AND INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL AND ORNAMENTAL IRON WORKERS LOCAL UNION NO. 1, AND ITS NAMED OFFICERS AND OFFICIALS, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.**

GEORGE S. HOBAN,
JEROME A. FRAZEL, JR.,
*Attorneys for Respondents, Joint Apprenticeship Committee, etc., and its named officers and officials.*

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## BRIEF FOR RESPONDENTS, JOINT APPRENTICESHIP COMMITTEE OF THE STEEL WORKERS OF CHICAGO AND INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL AND ORNAMENTAL IRON WORKERS LOCAL UNION NO. 1, AND ITS NAMED OFFICERS AND OFFICIALS, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

---

*To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:*

Respondents pray for the denial of the Petition for Writ of Certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit, entered in the above-entitled case on May 26, 1964.

## QUESTION PRESENTED FOR REVIEW.

Whether the issue raised by the complaint, wherein the plaintiffs sought a preliminary injunction to assist them in obtaining employment on a Federal Office Building under construction in Chicago, Illinois, has become moot because the construction has been completed.

## STATEMENT OF THE CASE.

Petitioners' Statement of the Case requires clarification on a number of very important points.

Petitioners state that the Union informed Tesauro, Bethlehem and Dost, that it would not accept Negro structural ironworkers or apprentices for work on the subject construction project. This is completely inaccurate, as more fully appears from petitioners' own Exhibit No. 23. This memorandum of a meeting held on July 10, 1963 states that the Union had indicated that qualified Negro workers would be admitted. There was no testimony or other evidence received at the hearing in connection with the application for temporary injunction which would permit an inference that they would not accept Negroes.

Plaintiffs' Statement of the Case, at page 7, implies that there was a controverted issue of fact as to whether the Joint Committee actually had approximately 150 applicants in its files on July 15, 1963, when it wrote to Bethlehem that it would supply any required apprentices from the Joint Committee's regular waiting list. It further seeks to cast doubt on this point by stating that many of the "alleged" applicants were found by the Committee to be unavailable. The record contains no evidence on this point other than the testimony of the Co-Ordinator of the Joint Apprenticeship Committee, Mr. Flood. He testified (Transcript Page 654) that at the time the plain-

tiffs applied for apprenticeship training in June of 1963, the Committee had in its file approximately 150 applicants. He stated that subsequent to Plaintiff's applications, around August 20, 1963, the Committee called nine new applicants from the waiting list and indentured them for training. In his testimony, he said that the Committee called approximately 60 of the applicants, whose names were on file prior to plaintiffs', and was unable to actually reach some of them. Others stated that they were no longer interested in an ironwork apprenticeship, while still others stated that they were presently employed and would like to have their turn deferred until the future. There was no other evidence offered at the hearing which even touched on this question, and no inference can possibly be drawn that the Joint Committee did *not* have approximately 150 prior applicants in its files at the time plaintiffs applied.

Plaintiffs' Statement of the Case further misstates the contents of the letter of September 23, 1963, from the President's Committee on Equal Employment Opportunity addressed to Mr. Dominic Tesauro, which was admitted into evidence as plaintiffs' Exhibit No. 27. Nowhere in this exhibit does the writer indicate that the President's Committee had conducted an investigation which, "confirmed the obvious violations of the Executive Order". This letter really said that Negroes were effectively denied opportunities in ironwork in Chicago because "of their lack of participation in this trade in the past", and further, because of the long apprenticeship waiting list. In effect, the letter confirmed the fact that there were long waiting lists, and, it implied that in order to give Negroes any present opportunities they would have to be "preferred". It is quite clear that the Executive Order did not contemplate giving preferences, but was designed to insure the very opposite, namely, equal treatment for all. The writer

of that letter therefore concluded that under the circumstances action against Bethlehem would not be appropriate at that time.

On Page 9 of their petition, plaintiffs point out that Bethlehem notified the District Court on or about October 25, 1963, that the steel work had been completed on the Federal Court House Building. It is important to note that the Court was advised at the first hearing on September 27, 1963 (see Transcript Page 24) that the work would be finished in less than a month and that the Court heard testimony on Thursday, October 10, 1963, from Mr. Charles W. Pitchford, Manager of erection for the Western District of Bethlehem Steel Company (see Transcript, Page 747), which showed that termination of the steel work on the building was imminent. Mr. Pitchford stated that three of the four derricks used in construction had been removed as of that date, that the fourth one would start to come down either the latter part of that week, or the first of the following week, that only 46 ironworkers and 2 apprentices remained on the job, that no new workers for this trade were being hired, and that ironworkers were being laid off as the job approached the end. This was six days before the oral opinion of October 16, 1963, and the notification of final completion given on October 25, 1963 was 14 days before the *nunc pro tunc* order of November 8, 1963.

## ARGUMENT.

### THE DECISION OF THE COURT OF APPEALS WAS CORRECT, AND IS NOT IN CONFLICT WITH THE APPLICABLE DECISIONS OF THIS COURT.

The most important document in the record of this case is the complaint. It is made a part of this brief and attached hereto as an Appendix. The importance of this document was clearly grasped by the Court of Appeals in the paragraph of its opinion quoted on Page 10 of the Petition under the section labeled "Reasons for Granting the Writ and Argument Amplifying Same".

The key words in this paragraph are "*within the scope of the complaint* (emphasis added)". The Court of Appeals laid great stress on this point during the course of the oral argument. A careful reading of the complaint makes it quite clear what this case is all about. Reduced to its simplest terms, the case is an attempt by the plaintiffs to obtain employment as structural ironworkers on the Federal Office Building which was being built in Chicago, Illinois during 1963 and 1964. They asserted their rights by allegations that the contract for the construction of that building required the contractor and subcontractors on that project not to discriminate against any employee or applicant for employment because of his race, religion or nationality; that they had been discriminated against because of their race, and that the Courts should apply certain sanctions provided in Presidential Executive Order No. 10925 of March 8, 1961 (see Appendix F, page 49a of the Petition herein) against the offending contractor and subcontractor until they ceased discriminating against the plaintiffs and gave them work on the project.

The gist of the complaint is employment on the Federal Court House Building in Chicago, Illinois. All of the allegations are structured to that end. Nowhere is there a general plea for admission into the apprenticeship training program as such. The alternatives on page 7 of plaintiffs' Statement of the Case are not the alternatives pleaded in the complaint. The complaint prays that defendants be enjoined from proceeding with the performance of Contract No. GS-5PC-1178 until plaintiffs are employed as ironworkers, *or* that the Court restrain the defendants from making or receiving any payments on account of the contract until the plaintiffs are so employed. Nowhere in the prayer for relief is mention made of admission into the iron workers apprenticeship program.

If plaintiffs prevail, both on this appeal and on an ultimate appeal on the merits, the case will then go back to the trial court for a hearing on a permanent injunction. The issue at such a hearing will presumably be, as pointed out by the Court of Appeals in its opinion (see page 36a, Appendix B to the Petition herein), discrimination against the plaintiffs as it might relate to other construction contracts. This issue is not raised by the complaint and, therefore, within the context of this action, it is an abstract question which the courts will not decide. The matter before this Court is nothing more than a temporary injunction which is applicable only to the Federal Office Building in Chicago, Illinois. As such, it is a very limited question and, therefore, lacking in general importance.

A reading of *Johnson-Kennedy Radio Corp.* v. *Chicago Bears Football Club, Inc.*, 97 F. 2d 223 (1938), will show its similarity to this case. The Court of Appeals correctly relied on that precedent. There it was, the radio broadcast of a football game, and in this case it was the ironwork in connection with the construction of a Federal Office Build-

ing. In both cases the particular physical events to which the injunction was directed had passed into history at the time the matter was before the reviewing court.

In the *Johnson* case the court could have enjoined the playing of the game between the Chicago Bears and Chicago Cardinals until there had been a final determination of who had the right to broadcast the game. Absent such an injunction, the teams had a right to proceed with the playing of the game, and this they did. Here, the court could have stopped the iron-work on the Federal Office Building directly, or indirectly, by stopping the payments to the contractor and subcontractor. Absent such an injunction, the subcontractor, Bethlehem Steel Company, had a right to continue with the work, and this it did.

In the *Johnson* case, the issue involved the right to broadcast the football game which was to be played on November 29, 1936. In this case the issue involves the right to be hired as ironworkers on the Federal Office Building. In *Johnson,* a resolution of the issue was found to be meaningless (and therefore moot) because the game had long since been played and there was nothing to broadcast no matter who prevailed on the appeal. Here the ironwork has long since been completed on the Federal Office Building, and there is no work the plaintiffs can do, even if they eventually prevail on the appeal.

The fact that the plaintiffs in this case are Negroes, and that it indirectly involves alleged discrimination in connection with an apprenticeship program, union membership, and employment practices, may tend to obscure the fact that the case is nothing more than an attempt to obtain employment on the Federal Office Building. Had this complaint been a direct attack on membership policies of the defendant Union, the apprenticeship selection policies of the defendant, Joint Apprenticeship Committee, and the connection of the Federal and State Governments to those

policies, this would have been an entirely different lawsuit. It must be remembered that the present state of the case results from a hearing on a motion for a preliminary injunction. As the Court of Appeals pointed out in its opinion (see page 34a, Appendix B of the Petition) the evidence considered at the hearing related primarily to contract No. GS-5PC-1178 and the failure of Bethlehem to employ the plaintiffs on that construction project.

Plaintiffs argue that the Court of Appeals erroneously found that it had before it "merely a temporary injunction applicable only to the specific contract project to which it is addressed." It is submitted that this statement by the Court of Appeals is probably the most accurate characterization which could be made of the case. Plaintiffs have made every effort to escape the dilemma they find themselves in as a result of the completion of the Federal Office Building. Both before the Court of Appeals in their briefs, and oral arguments, and in the Petition filed herein, they seek to broaden the issue beyond the particular project.

The speciousness of their argument is clearly pointed up by the fact that the third named plaintiff, Michael Cochran, was denied relief by the trial court even though all of the evidence of the alleged discrimination presumably applied equally to him as to the other two named plaintiffs, Ronald Todd and James Hill. Even more significant is the fact that this relief was apparently denied because the evidence showed that the subcontractor, Bethlehem Steel Company, only offered to hire two of the three plaintiffs (see plaintiffs' Exhibit No. 24). The District Court apparently selected the plaintiffs, Todd and Hill, rather than Cochran on the basis of the testimony of the witness Del-Giorno (see Transcript Pages 722-735). The testimony of this witness produced by the subcontractor, Bethlehem Steel Company, tended to cast doubts on the veracity of the plaintiff, Michael Cochran, and apparently the District

Court felt that this constituted a declaration by Bethlehem that they would not consider him a satisfactory employee. Granting, for the sake of argument, that this was Bethlehem's conclusion, and that they properly rejected Cochran for other than racial reasons, this did not constitute a reason for denying to Cochran the so-called broader relief which plaintiffs now argue is involved in this suit. If this conclusion is correct, then it must follow that counsel's failure to take an appeal on behalf of the plaintiff Cochran (he did not take an appeal to the Court of Appeals; see Court's opinion p. 36a Appendix B of the Petition) constitutes a tacit admission that the action really pertained only to the Federal Office Building, and nothing more.

Petitioners rely on the case of *Local 47, etc.* v. *N. L. R. B.*, 341 U. S. 707 (1951). This case involved the issuance of a cease and desist order by the National Labor Relations Board in connection with alleged unfair labor practices by the Union. The original complaint filed with the Board was based on a strike which the Union called against work that the complainant was doing on a home in Chattanooga, Tennessee. The Union ordered its union carpenters not to work so long as the complainant's non-union men were working on the job. The cease and desist order was directed at the Union's entire relationship to the complainant's business. It was a general protective order given to the complainant so that he would no longer be harassed by the same unfair labor practice. This is in sharp distinction to the present case, where the complaint was aimed solely at obtaining employment for the plaintiffs on the Federal Office Building project. The underlying dispute was over plaintiffs' efforts to obtain employment on the Federal Office Building, the defendants alleged discrimination against them, and refusal to give them such employment.

Petitioners refer to the case of *Federal Trade Commission* v. *Goodyear Rubber Co.*, 304 U. S. 257 (1938), which is an example of the principle that a continuing order, such as the one which was entered by the Federal Trade Commission in that case, does not become moot just because the particular conduct which prompted it has ceased.

The order in the *Goodyear* case was aimed at Goodyear's unlawful price discrimination in favor of Sears & Roebuck. In order to be effective such an order had to be a continuing one which would subject Goodyear to the appropriate sanctions in the event that it violated the order at some future date. This would be true notwithstanding the fact that at the time of the review they had ceased the illegal price discrimination. This principle certainly has no application to this case, since the complaint involved the efforts of the plaintiffs to obtain employment on the Federal Office Building, rather than any continuing course of conduct. The rule in the *Goodyear* case would be applicable here only if there would be additional structural ironwork on the Federal Office Building in the future. In such event, the court's order here would be meaningful, and could be enforced at such time as there was additional work. It is patent that such is not the nature of this construction work.

Petitioners argue that the case of *Ramsburg* v. *American Investment Co. of Illinois*, 231 F. 2d 333 (1956) is in conflict with the Court of Appeals decision in the instant case. They neglect, however, to call to this Court's attention the case of *Fink* v. *Continental Foundry & Machine Company*, 240 F. 2d 369 (1957). This was a later case of the Seventh Circuit Court in which it distinguished the *Ramsburg* case, and it is submitted that the *Fink* case principle is the one which is applicable to this case. The Court stated at page 374 of the *Fink* opinion the general rule:

"The general law, as well as the law in this Cir-

> cuit, has long been established that if pending an appeal an event occurs which renders it impossible for the Appellate Court to grant any relief or renders a decision unnecessary the appeal will be dismissed."

This respondent also respectfully directs the court's attention to the case of *Mills* v. *Green,* 159 U. S. 651, 40 L. Ed. 293, 16 Sup. Ct. 132 (1895). This case was cited with approval in both the *Johnson-Kennedy* case, *supra,* and the *Fink* case, *supra.* The *Mills* case was an action for an injunction against the supervisor of registration of a county in the State of South Carolina. The suit sought to restrain the supervisor from performing certain acts and for other relief. The District Court granted an injunction but the United States Circuit Court of Appeals for the Fourth Circuit reversed the order, dissolved the injunction, and remanded the case with directions to dismiss. An appeal was taken to the United States Supreme Court, by the plaintiff, and thereafter the defendant moved to dismiss the appeal on the ground that the case was moot. In granting the motion to dismiss, this Court said at page 295:

> "In the case at bar, the whole object of the bill was to secure a right to vote at the election to be held, as the bill alleged, on the third Tuesday of August, 1895, of delegates to the constitutional convention of South Carolina. Before this appeal was taken by the plaintiff from the decree of the circuit court of appeals dismissing his bill, that date had passed; and, before the entry of the appeal in this court, the convention had assembled, pursuant to the statute of South Carolina of 1894, by which the convention had been called. 21 S. C. Stat. 802, 803. * * * It is obvious, therefore, that, even if the bill could properly be held to present a case within the jurisdiction of the circuit court, no relief within the scope of the bill could now be granted."

This language in the *Mills* case is almost the same as that used by the Court of Appeals in its opinion in this case,

". . . no relief within the scope of the bill could now be granted."

It is significant that in paragraph 5 of the complaint (see page 15 of Appendix A) the plaintiffs actually define the Class, allegedly included in the class action, in terms of contract No. GS-5PC-1178. That paragraph says "The provisions of the contract quoted hereinbefore were entered into for the benefit of plaintiffs and persons similarly situated." Yet, they now argue that the action really has nothing specifically to do with that contract, nor the Federal Office Building, but is actually an attack on the entire Union Apprentice Program insofar as it may discriminate against Negroes, generally.

Mr. Justice Holmes dealt with a question of mootness in the case of *Barker Painting Company* v. *Local No. 734, Brotherhood of Painters, Decorators, and Paperhangers of America, et al.*, 281 U. S. 462, 74 L. Ed. 967 (1930). In that case the plaintiff filed a bill in equity to enjoin the Union from striking a painting job which the plaintiff had taken in Somerville, New Jersey. A preliminary injunction was issued restraining the workmen from observing the union rules and from not returning to work. All the men obeyed the injunction, except one who completed the job. On appeal, the Court of Appeals refused to go into the case on the merits. In affirming that decree, Justice Holmes said at page 463 as follows:

> "Both sides desired that the court should go farther afield. But a court does all that its duty compels when it confines itself to the controversy before it. It cannot be required to go into general propositions or prophetic statements of how it is likely to act upon other possible or even probable issues that have not yet arisen. See *Willing* v. *Chicago Auditorium Asso.*, 277 U. S. 274, 72 L. ed. 880, 48 Sup. Ct. Rep. 507. The controversy here was between the plaintiff and the painters in Somerville who prevented its finishing its

> job. If the case had needed to be considered on its merits, it would have been likely to involve a discussion more or less far-reaching of the powers of the union, but the plaintiff could not impose a duty to go into that discussion when, before the time for it, the resistance had been withdrawn and the job had been done."

See also *United States* v. *Hamburg-Amerikanische Packetfahrt-Actien Gesellschaft, et al.*, 239 U. S. 467, 60 L. ed. 387, 36 Sup. Ct. 212 (1916) and *United States* v. *Alaska Steamship Company*, 253 U. S. 113, 64 L. ed. 808, 40 Sup. Ct. 448 (1920).

Counsel for plaintiffs, in his original statement to the District Court at the hearing held September 27, 1963 (see Transcript Page 10) probably best summed up the nature of the case when he said as follows:

> "Now, we complain in our complaint that though the plaintiffs are qualified and they demonstrated their qualifications and despite the plain provision of the contract that the contractor, subcontractor and none of the defendants have provided for these plaintiffs the benefits which this contract contemplates will be available to the plaintiffs and to the class of persons that represents. (sic)
>
> "So we are here as third party beneficiaries to a contract, asking the Court to furnish its aid in enforcing a contract on behalf of persons who are beneficiaries as the terms of the contract demonstrate to secure rights provided for in the contract which by their own efforts they have not so far have been able to secure or, *to put it in another way, this is a simple case in which the plaintiffs seek to enforce the contract as to which though they are not parties they are beneficiaries, and being beneficiaries, we assert their right to enforce that contract to secure the benefits intended for them.*" (Emphasis added.)

The contract to which counsel referred was the one for the construction of the Federal Office Building. It does not

pertain to any other construction project. Thus, by plaintiffs' own admission the case involves only the limited question of their rights to work on that building. The work having been completed, under the principles herein discussed, the cause is moot.

## CONCLUSION.

Respondent Joint Apprenticeship Committee and its named officers and officials say that the decision of the Court of Appeals in this case is in accord with both the prior decisions of that Court, and also those of this Court. In arriving at its decision, the Court of Appeals properly applied the controlling principles of law. For those reasons, and those set forth above, these respondents urge that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

.....

GEORGE S. HOBAN,

.....

JEROME A. FRAZEL, JR.,
*Attorneys for Respondents, Joint Apprenticeship Committee, etc., and its named officers and officials.*

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## APPENDIX.

IN THE UNITED STATES DISTRICT COURT
For the Northern District of Illinois,
Eastern Division.

Ronald L. Todd and Michael Cochran by his parents and next friends, Ulysses Cochran and Patricia Cochran, and James Hill,

*Plaintiffs,*

*vs.*

Joint Apprenticeship Committee of the Steel Workers of Chicago and International Association of Bridge, Structural and Ornamental Iron Workers Local Union No. 1, Sidney I. Cole, Chairman, Frank D. Reiland, Treasurer, A. Walter Becker, Thomas Cannon, James Eads, Joseph Frankovic, Stanford Jacobs, and Edmund D. Flood, Apprentice Co-Ordinator, Iron Workers Bridge and Structural Union, Local No. 1, Steve Zakula, President, Frank Pauley, Secretary-Treasurer, Joseph Frankovic, Job Representative, and Edmund D. Flood, Apprentice Co-Ordinator, Iron Workers District Council of Chicago & Vicinity, Leslie L. Myers, President, Robert Benson, Secretary and William Knapp, Vice-President; Paschen Contractors, Inc., a Delaware corporation; Peter Kiewit Sons Co., a Nebraska corporation; Bethlehem Steel Company, a Delaware corporation; and Dominic Tesauro, Regional Administrator, General Services Administration,

*Defendants.*

No. 63-C-1739.

## COMPLAINT.

Now come Ronald L. Todd and Michael Cochran, by his parents and next friends, Ulysses Cochran and Patricia Cochran, and James Hill, all residents and citizens of the State of Illinois and of the United States of America by William R. Ming, Jr., and George N. Leighton, their attorneys, complaining of Joint Apprenticeship Committee of The Steel Workers of Chicago and International Association of Bridge, Structural and Ornamental Iron Workers Local Union No. 1, Sidney I. Cole, Chairman, Frank D. Reiland, Treasurer, A. Walter Becker, Thomas Cannon, James Eads, Joseph Frankovic, Stanford Jacobs, Edmund D. Flood, Apprentice Co-Ordinator; Iron Workers Bridge and Structural Union, Local No. 1, Steve Zakula, President, Frank Pauley, Secretary-Treasurer, Joseph Frankovic, Job Representative, and Edmund D. Flood, Apprentice Co-Ordinator; and Iron Workers District Council of Chicago & Vicinity, Leslie L. Myers, President, Robert Benson, Secretary and William Knapp, Vice-President, all of which organizations and individuals are sometimes collectively referred to hereinafter as the Union; Paschen Contractors, Inc., a Delaware corporation, and Peter Kiewit Sons' Co., a Nebraska corporation, hereinafter referred to as Contractors; Bethlehem Steel Company, a Delaware corporation, hereinafter referred to as Sub-Contractor; and Dominic Tesauro, Regional Administrator of the General Services Administration, hereinafter referred to as Administrator, hereby invoke the jurisdiction of this Court under the provisions of Title 28 U. S. C., Section 1331, in that the matter in controversy arises under the constitution and laws of the United States and the amount in controversy is in excess of $10,000.00.

For cause of action plaintiffs allege:

1. On or about October 26, 1962, by Contract No. GS-5PC-1178 Contractors undertook and agreed to construct a United States Courthouse and Federal Office Building in Chicago, Illinois. One of the provisions of that contract was as follows:

> "In connection with the performance of work under this contract, the Contractor agrees as follows:
>
> (a) The Contractor will not discriminate against any employee or applicant for employment because of race, creed, color or national origin. The Contractor will take affirmative action to ensure that applicants are employed, and that employees are treated during employment without regard to their race, creed, color, or national origin. Such action shall include, but not be limited to, the following: employment, upgrading, demotion or transfer; recruitment or recruitment advertising; layoff or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeship. The Contractor agrees to post in conspicuous places, available to employees and applicants for employment, notices to be provided by the Contracting Officer setting forth the provisions of this Nondiscrimination clause.
>
> (b) The Contractor will, in all solicitations or advertisements for employees placed by or on behalf of the Contractor, state that all qualified applicants will receive consideration for employment without regard to race, creed, color, or national origin.
>
> (c) The Contractor will send to each labor union or representative of workers with which he has a collective-bargaining agreement or other contract or understanding, a notice, to be provided by the agency Contracting Officer, advising the said labor union or workers' representative of the Contractor's commitments under this Nondiscrimination clause, and shall post copies of the notice in conspicuous places available to the employees and applicants for employment.

(d) The Contractor will comply with all provisions of Executive Order No. 10925 of March 6, 1961, and of the rules, regulations, and relevant orders of the President's Committee on Equal Employment Opportunity created thereby.

(e) The Contractor will furnish all information and reports required by Executive Order No. 10925 of March 6, 1961, and by the rules, regulations, and orders of the said Committee, or pursuant thereto, and will permit access to his books, records, and accounts by the contracting agency and the Committee for purposes of investigation to ascertain compliance with such rules, regulations, and orders.

(f) In the event of the Contractor's noncompliance with the Nondiscrimination clause of this contract or with any of the said rules, regulations, or orders, this contract may be canceled in whole or in part and the Contractor may be declared ineligible for further Government contracts in accordance with procedure authorized in Executive Order No. 10925 of March 6, 1961, and such other sanctions may be imposed and remedies invoked as provided in the said Executive order or by rule, regulations, or order of the President's Committee on Equal Employment Opportunity, or as otherwise provided by law.

(g) The Contractor will include the provisions of the foregoing paragraphs (a) through (f) in every subcontract or purchase order unless exempted by rules, regulations, or orders of the President's Committee on Equal Employment Opportunity issued pursuant to section 303 of Executive Order No. 10925 of March 6, 1961, so that such provisions will be binding upon each subcontractor or vendor. The Contractor will take such action with respect to any subcontract or purchase order as the contracting agency may direct as a means of enforcing such provisions, including sanctions for noncompliance: *Provided, however,* that in the event the Contractor becomes involved in, or is threatened with, litigation with a subcontractor or vendor as a result of such direction by the contracting agency, the

Contractor may request the United States to enter into such litigation to protect the interests of the United States."

Another provision was as follows:

"Apprentices will be permitted to work only under a bona fide apprenticeship program registered with a State Apprenticeship Council which is recognized by the Federal Committee on Apprenticeship, U. S. Department of Labor; or if no such recognized Council exists in a State, under a program registered with the Bureau of Apprenticeship, U. S. Department of Labor."

At all times material herein there was in full force and effect in the State of Illinois, a bona fide apprenticeship program for iron workers which had been approved by the United States Department of Labor on September 30, 1952.

2. Under the provisions of the said iron workers apprenticeship program the only requirements for apprentices are:

"A. Applicants for apprenticeship shall be not less than eighteen (18) years of age nor more than thirty (30) years of age, have a pronounced aptitude and interest in this craft and be physically able to perform the required work.

B. They shall be American citizens or make declarations to become same, or Canadian citizens within the Dominion of Canada.

C. They shall provide proof of their age.

D. They shall keep such records of their apprenticeship training as may be required by the Committee."

3. Plaintiffs Ronald L. Todd, Michael Cochran and James Hill are twenty-three (23), eighteen (18) and twenty-one (21) years of age respectively, and having been born

in the United States, plaintiffs are citizens of the United States. They belong to the ethnic group commonly designated as Negroes. Plaintiffs and each of the persons who constitute the class to which plaintiffs belong have a pronounced aptitude and interest in the iron workers craft and are physically able to perform the required work. Each plaintiff provided proof of his age to the Iron Workers' Joint Apprenticeship Committee on or about the 12th day of June, 1963, and has demonstrated that he satisfies the minimum standards of education and experience for apprenticeship under the said apprentice program. Said Committee refused to certify plaintiffs as apprentices solely because of their race and color. Plaintiffs and each of the persons of the class to which plaintiffs belong are persons who are either without financial means or of limited financial ability to bear the necessary costs and expenses of these proceedings. Defendants, on the other hand, are corporations, associations and individuals, who own and control vast sums of resources and assets.

4. In April 1963 plaintiffs and each of them sought employment by the Sub-Contractor as an apprentice iron worker. Notwithstanding the application and qualifications of plaintiffs and each of the persons similarly situated, Bethlehem Steel Company has failed and refused to employ these persons or any of them to work on the project covered by Contract No. GS-5PC-1178 solely because of their race and color. For the same reason the Sub-Contractor has refused to employ any person as a structural iron worker who is a Negro. Moreover, though Contractors well-know all of the facts alleged herein to be true, Contractors have failed and refused to take action, affirmative or otherwise to cause employment of plaintiffs.

5. The provisions of the contract quoted hereinbefore were entered into for the benefit of plaintiffs and persons similarly situated. Plaintiffs are members of a class of

persons who, being residents and citizens of the United States, commonly designated as Negroes, are and have been for many years objects and victims of discrimination in employment and exclusion from certain classes and crafts of employment of which the craft of structural iron workers is one. The size of this class is so great and the number of persons so numerous that it would not be practicable for all such persons to join in this action. Plaintiffs therefore bring this action on their own individual behalf and on behalf of that class.

6. All of the defendants herein well know the truth of the allegations contained herein. Notwithstanding the aforesaid, none of the defendants has secured enforcement of the rights of the plaintiffs or the class they represent under the terms of Contract No. GS-5PC-1178. The plaintiffs have no remedy at law which would be adequate.

7. On or about the 6th day of March, 1961, the President of the United States issued Executive Order No. 10925, which provides, in part:

> "WHEREAS discrimination because of race, creed, color, or national origin is contrary to the Constitutional principles and policies of the United States; and
>
> WHEREAS it is the plain and positive obligation of the United States Government to promote and ensure equal opportunity for all qualified persons, without regard to race, creed, color, or national origin, employed or seeking employment with the Federal Government and on government contracts; and
>
> WHEREAS it is the policy of the executive branch of the Government to encourage by positive measures equal opportunity for all qualified persons within the Government; and
>
> WHEREAS it is in the general interest and welfare of the United States to promote its economy, security, and national defense through the most efficient and effective utilization of all available manpower; . . ."

WHEREFORE, the plaintiffs respectfully pray this Court to enjoin the defendants and each of them from proceeding with the performance of Contract No. GS-5PC-1178 unless and until plaintiffs and each of them is duly and regularly employed as an iron workers apprentice or in the alternative that this Court enjoin and restrain the defendants and each of them from making or receiving any payments on account of such contract unless and until plaintiffs and each of them is duly and regularly employed as an iron workers apprentice.

RONALD L. TODD and MICHAEL COCHRAN, by his parents and next friends, Ulysses Cochran and Patricia Cochran, and JAMES HILL,

*Plaintiffs,*

By.....

WILLIAM R. MING, JR.,
GEORGE N. LEIGHTON,
*Of Counsel.*

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Supreme Court of the United States

RONALD L. TODD and RICHARD CUCHRAN, by his parents and next friends, DEATHERS CUCHRAN and PATRICIA CUCHRAN, and JAMES HILL,

*Petitioners,*

v.

JOINT APPRENTICESHIP COMMITTEE OF THE STEEL WORKERS OF CHICAGO AND INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL AND ORNAMENTAL IRON WORKERS LOCAL UNION NO. 1, Sidney L. Cole, Chairman, Frank D. Reiland, Treasurer, A. Walter Becker, Thomas Cannon, James Eads, Joseph Frankovic, Stanford Jacobs, and Edmund D. Flood, Apprentice Co-Ordinator, IRON WORKERS BRIDGE AND STRUCTURAL UNION, LOCAL NO. 1, Steve Zakula, President, Frank Panley, Secretary-Treasurer, Joseph Frankovic, Job Representative, and Edmund D. Flood, Apprentice Co-Ordinator, BETHLEHEM STEEL COMPANY, a Delaware corporation,

*Respondents.*

*On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit*

## BRIEF FOR RESPONDENT LOCAL UNION NO. 1 IN OPPOSITION

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1964

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**NO. 380**

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RONALD L. TODD and MICHAEL COCHRAN, by his parents and next friends, ULYSSES COCHRAN and PATRICIA COCHRAN, and JAMES HILL,

*Petitioners,*

vs.

JOINT APPRENTICESHIP COMMITTEE OF THE STEEL WORKERS OF CHICAGO AND INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL AND ORNAMENTAL IRON WORKERS LOCAL UNION NO. 1, Sidney I. Cole, Chairman, Frank D. Reiland, Treasurer, A. Walter Becker, Thomas Cannon, James Eads, Joseph Frankovic, Stanford Jacobs, and Edmund D. Flood, Apprentice Co-Ordinator, IRON WORKERS BRIDGE AND STRUCTURAL UNION, LOCAL NO. 1, Steve Zakula, President, Frank Pauley, Secretary-Treasurer, Joseph Frankovic, Job Representative, and Edmund D. Flood, Apprentice Co-Ordinator; BETHLEHEM STEEL COMPANY, a Delaware corporation,

*Respondents.*

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*On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit*

---

## BRIEF FOR RESPONDENT LOCAL UNION NO. 1 IN OPPOSITION

---

## QUESTION PRESENTED

Whether an action seeking only to enjoin defendants from proceeding with the performance of a specific General Services Administration contract for construction, or in the alternative, restraining further payment under such government contract unless and until plaintiffs were employed, is rendered moot by the completion of the work to be done under said contract.

## STATEMENT

Petitioners (Negro Americans)[1] filed an action in the District Court seeking to compel Bethlehem Steel Company (Bethlehem) to employ them specifically as iron worker apprentices on the construction of a United States Court House and Federal Office Building under General Services Administration (GSA) construction contract No. GS 5 PC-1178.[2] Alternatively, Petitioners sought to have the gov-

1. No printed record or appendix has been filed with this Court. The letters "Tr." followed by a number refer to the pages of the Transcript of Proceedings in the District Court. Where no transcript references appear the facts are taken from the opinion of the Court of Appeals, appearing as Appendix B to the Petition, pages 29a-37a.

2. On October 26, 1962, Paschen Contractors, Inc. and Peter Kiewit Sons Co., Contractors, entered into Contract No. GS-5 PC-1178 with the General Services Administration to construct a United States Court House and Federal Office Building in Chicago, Illinois. Paschen, etc. entered into a subcontract with Respondent, Bethlehem Steel Company for the fabrication and erection of structural steel on such project.

ernment payments to Bethlehem withheld pending their employment on the job. The GSA construction contract incorporated by reference Presidential Executive Order No. 10925 (Petition, App. 49a *et seq.*) which, *inter alia*, prohibited racial discrimination in the performance of government contracts (such as involved herein). Additionally, the contract provided that apprentices "will be permitted to work only under a bona fide apprenticeship program registered" with the United States Department of Labor. Such a program was in effect and administered by the Joint Apprenticeship Committee (JAC)[3] consisting of an equal number of representatives from the Chicago Steel Erectors (a city wide employer association) and Local Union No. 1, Ironworkers (Union),[4] the instant Respondent.

In addition to Bethlehem, the Complaint joined as defendants, the Regional Administrator for the GSA, the JAC and the Union. Later the Chicago Board of Education and the Regional Director of the United States Department of Labor were also made defendants.

Petitioners' Complaint is set forth herein as Appendix A (App. 1 to 8). Filed on September 26, 1963 (the contract was awarded on October 26, 1962) it alleged that a contract had been awarded to construct a United States Courthouse and Federal Office Building in Chicago, Illinois and that the contract required the contractor and all subcontractors not to discriminate against any employee or applicant for employment because of race, creed, color or

---

3. The full name of the JAC is the Joint Apprenticeship Committee of the Steel Workers of Chicago and International Association of Bridge, Structural and Ornamental Ironworkers Local Union No. 1.

4. The full name of the Union is International Association of Bridge, Structural and Ornamental Iron Workers, Local Union No. 1.

national origin and to take further steps consistent with such requirement (Par. 1 of Complaint, App. 3). The Complaint further alleged that the contract required that where there was an apprenticeship program approved by the United States Department of Labor, apprentices would be permitted to work on such job under said contract only under such apprenticeship program (Par. 1, App. 5). After reciting that Petitioners were negroes and that they satisfied the minimum requirements for becoming apprentices (Par. 3, App. 6), the Complaint alleged that Petitioners sought employment with Bethlehem Steel Company, a sub-contractor under said contract, and that Bethlehem Steel Company had refused or failed to employ them on the particular project covered by the said contract (Par. 4, App. 6-7). The Complaint thereafter sought the enforcement of the alleged rights of Petitioners under said contract for construction (Par. 6, App. 7),[5] and prayed that the

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5. The Court of Appeals summarized the allegations of the Complaint as follows (Pet. App. 33a-34a):

"1. Provisions of Contract No. GS-5 PC-1178.

2. Provisions of the iron workers apprenticeship program.

3. That plaintiffs were native born citizens and Negroes.

4. That plaintiffs and all persons who constitute the class to which they belong were eligible to qualify for the apprenticeship training program; that they made application therefor and were denied certification solely because of their race and color.

5. That in April, 1963, plaintiffs sought employment on the construction project from Bethlehem, which was denied because they were Negroes.

6. That plaintiffs brought the action on behalf of themselves and the class to which they belong and have failed to secure enforcement of their rights to employment under the terms of Contract No. GS-5 PC-1178.

7. Provisions of Executive Order No. 10925."

defendants be enjoined from proceeding in the performance of the specific contract of construction (identified throughout the Complaint as Contract No. GS-5 PC-1178) unless and until Petitioners were regularly employed as iron worker apprentices, or in the alternative, the Complaint requested that no payments under said contract be made until such time as Petitioners were employed (Prayer of Complaint, App. 8). Neither damages nor any other relief was requested. Specifically, the prayer for relief read as follows (Pet. App. 34a, App. 8):

> "Wherefore, the plaintiffs respectfully pray this Court to enjoin the defendants and each of them from proceeding with the performance of Contract No. GS-5 PC-1178 unless and until plaintiffs and each of them is duly and regularly employed as an iron workers apprentice or in the alternative that this Court enjoin and restrain the defendants and each of them from making or receiving any payments on account of such contract unless and until plaintiffs and each of them is duly and regularly employed as an iron workers apprentice."

As the Court of Appeals stated, "The evidence considered by the trial court (at the trial on the preliminary injunction) related primarily to Contract No. GS-5 PC-1178 and the failure of Bethlehem to employ plaintiffs on that construction project." (Pet. App. 34a). "Some of the defendants (such as the instant Respondent) introduced no evidence" *(Ibid)*—from the outset Petitioners confined their action to one involving employment at specific work by a specific contractor on a specific job at a specific location under a specific GSA contract.[6]

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6. Illustratively, see comments of Petitioners' counsel in open court on September 27, 1963:

> "Now we complain in our complaint that though the plaintiffs are qualified . . . and despite the plain provision of the contract . . . the contractor, subcontractor and none of the defendants

On November 8, 1963, the trial court entered a preliminary injunction requiring Bethlehem to employ Petitioners as apprentice iron workers when properly certified by the JAC and the Union, directed the Union to admit Petitioners as members of the Union and the JAC to certify them as apprentices (Pet. App. 65a-67a). The preliminary injunction was entered *nunc pro tunc* as of October 16, 1967.[7] On

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have provided for these plaintiffs the benefits which this contract contemplates will be available to the plaintiffs and to the class of persons that represents. (Tr. 10).

"So we are here as third party beneficiaries to a contract asking the court to furnish its aid in enforcing a contract . . . or, to put it in another way, **this is a simple case in which the plaintiffs seek to enforce the contract** as to which, though they are not parties, they are beneficiaries, and being beneficiaries, we assert their right to enforce that contract to secure the benefits intended for them (Tr. 10-11). (Emphasis supplied).

"I think the Court will recognize that construction work being what it is, i.e., performance of a contract by which the work having been done, the contract terminates. **That unless we are provided with equitable relief the rights of these plaintiffs which are the rights under the contract to be hired and to be trained will be dissipated upon the performance of the contract.** (Tr. 11). (Emphasis supplied).

"So that further in aid of our application for equitable relief we point out to the court what we are really seeking to do is to invoke the courts of the United States to enforce the contract . . . (Tr. 14).

"They (plaintiffs) are citizens of the United States. They seek to assert rights provided for them in a contract between the United States and private persons and **we ask the court, and we have suggested in our prayer for relief that the court either restrain continued performance of the contract . . . or that the court require the parties not to pay or accept money in connection with the performance of the contract.**" (Tr. 14-15). (Emphasis supplied).

7. The Court of Appeals found it unnecessary to reach the question of "whether the district court had authority to apply an injunction retroactively by the issuance of a *nunc pro tunc* order." (Pet. App. 37a).

October 11, 1963, Bethlehem apprised the trial court in writing that "no more apprentice iron workers would be employed on the job site in question, its subcontract being substantially completed at that time." (Ct. of Appeals Dec., Pet. App. 34a). "On October 22, 1963, respective counsel of the parties appeared before the trial court for the purpose of setting bond, the entry of formal findings of fact and conclusions of law and a formal decree. At that time, Bethlehem advised the court that 'all work of Bethlehem on the site in question will be concluded tomorrow.' The court then stated, 'Very well, the record may so show' " (*Id.* Pet. App. 35 a).

Following the filing of the Record in the Court of Appeals, Respondent (along with the JAC and Bethlehem) moved to remand the cause to the district court to dismiss because of mootness. The Court of Appeals so directed.[8]

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8. The Court of Appeals specifically stated that it did not "reach the question of the validity of the trial court's findings and conclusions and its judgment and decree based thereon." (Pet. App. 37a). Apart from the issue of mootness, questions raised before the district court included its refusal to permit the intervention, as indispensable parties, of other applicants for apprenticeship who had made prior application and who would be harmed if Petitioners were employed before or in lieu of them; questions relating to preemption and the exclusiveness of remedy before the National Labor Relations Board; See *Hughes Tool Company*, 147 NLRB No. 166 (1964), holding that unequal treatment by a union of members of a bargaining unit because of race violates the National Labor Relations Act and *Miranda Fuel Company, Inc.*, 140 NLRB 181 (1962) holding it illegal for a union to take any action against an employee upon the basis of classifications or considerations "which are irrelevant, invidious, or unfair."; questions of the failure to exhaust administrative remedies. See *Farmer* v. *Philadelphia Electric Company*, —— F 2d ——, 55 LRRM 2685 (March 12, 1964), holding that a Federal District Court did not have jurisdiction of a damage action by a discharged employee against a government contractor based on a charge that the contractor had dismissed the employee because of his race in violation of non-discrimination provisions required in government contracts by Executve Orders and imple-

## ARGUMENT

The Court of Appeals properly directed that this action be dismissed for mootness. As the Court stated, "In the instant case, we have before us merely a temporary injunction applicable only to the specific construction project to which it was addressed." (Pet. App. 37a). The Court's "study of the record convince(d) (it) that plaintiffs, by this action, sought to enjoin defendants from proceeding with the performance of Contract No. GS-5 PC-1178 unless and until they were regularly employed as iron worker apprentices by Bethlehem on this construction site; or, in the alternative, restraining further payments to . . . Bethlehem until such employment was granted." (Pet. App. 36 a). Petitioners complained only about Bethlehem's contract for steel erection on the federal courthouse project in Chicago under GSA contract No. GS-5 PC-1178. To the extent that the GSA contract required Bethlehem to employ only apprentices indentured under a registered apprenticeship program, if such program was in existence—and because there was a program in existence administered by the JAC, which included representatives from the Union, the JAC and the Union were joined as party defendants. Finding for Petitioners, the Trial Court directed the JAC to indenture Peti-

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menting regulations, since the plaintiff had failed to exhaust the administrative remedies provided in the Executive Orders; whether membership in a union could be ordered as a matter of right, See *Steele* v. *Louisville & Nashville Railroad Company, et al.*, 323 U. S. 192 (1944), where, in upholding the right of non-member negro railroad firemen to fair and impartial representation by their statutory bargaining representative under the Railway Labor Act, the Court nevertheless stated, ". . . the statute does not deny to such a bargaining labor organization the right to determine eligibility to its membership . . ."; and evidentiary matters such as whether the mere absence alone of a condition (employment of negro iron workers) could form the basis of a finding of discrimination. This Respondent, in the light of the limited question in this case, introduced no evidence. See circa text. fn. 6, supra.

tioners as apprentices under the apprenticeship program, the Union to take them into membership, and Bethlehem to employ them on the specific construction project as iron worker apprentices. The portion of the Decree dealing with indenture of Petitioners by the JAC, admission into the Union, and certification by the JAC to Bethlehem was solely to permit the employment of Petitioners as apprentices by Bethlehem consistent with the terms of the GSA contract which required Bethlehem to employ only apprentices who had been certified under a registered apprenticeship program. Bethlehem's contract having been fulfilled at the time of the entry of the Decree, any case or controversy which might have existed prior thereto had come to an end. The employment of Petitioners on the Bethlehem project under contract No. GS-5 PC-1178 was moot. And the employment by Bethlehem was the only issue litigated. No other contractor or construction project was involved, nor did Petitioners complain in any general way that they were deprived of any rights cognizable or for which a remedy could be granted by a federal court.

Petitioners, as they suggest, have not been deprived of a remedy. They themselves elected to file suit involving a specific job under a specific GSA contract. Should they complain in the future [9] that they were illegally deprived of

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9. At no time did the Union resist the employment of Negro iron workers In fact, the only evidence in the record reflects that they had no objection to the employment of Negro journeymen iron workers immediately or as Bethlehem saw fit (Tr. 330-335). Nor did the Union or JAC refuse to accept the applications of the Petitioners for apprenticeship indenture (Tr. 343-344, 636). They only insisted that the Petitioners, like all other applicants, wait to be called from the roster of apprentice applicants based upon the availability of apprenticeship openings in the industry—the JAC being required to consistently keep an apprentice employed during his term of indenture once he was certified (Tr. 671). Because of the contention that the "slate should be wiped clean" and all applicants

employment on another construction project they would be required to file an independent action relating to such project or all projects in general. And if such were to occur, the complaint would determine the nature of the issues.[10] As regards the project here, there was nothing to enjoin or mandatorily direct. And Petitioners are more than aware of this. On page 13 of their Petition they state that "what the court below has done is to seize upon an apparent present impossibility of compliance with the precise terms of

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for apprentice be assigned not on the basis of seniority in making application but rather on objective testing applicable, both to prior and current applicants, the JAC instituted a new system of objective testing based upon predetermined standards and requested all applicants to appear for such testing. Petitioners, along with all other applicants were notified of the time and place to appear (App. B, 9-11). Indicative of Petitioners' desire not to become apprentices as such under the apprenticeship program but rather to be employed on this particular Bethlehem job, Petitioners filed for (App. C, 12-15) and secured (App. D, 16-17) a temporary restraining order before District Judge Walter LaBuy restraining the JAC from applying the testing procedure to Petitioners. The temporary restraining order was secured in the absence of Judge Campbell, the trial judge in the instant matter, and when he returned (February 3, 1964) he refused to extend same, and dismissed it for "want of jurisdiction". Indentured apprentices under the apprenticeship program not assigned to one employer as such are kept employed for a three year period with various employers in the Chicago area and directed to employment by the JAC consistent with the needs of the industry and training sought to be secured in behalf of the apprentices (Tr. 667-668, 690).

10. As commented upon in fn. 9, supra, the objection of the JAC and the Union to Petitioners' position was that they not only sought preference over other applicants (which in the opinion of the JAC and the Union would have exposed them to claims of discrimination made by other applicants) but additionally, Petitioners sought specific employment on a specific job rather than to integrate into an apprenticeship program which covered all jobs within the Chicago area. Although the trial court stated that he would permit the intervention in the case (Tr. 917) of other applicants for apprenticeship, upon motion of such other applicants, he refused intervention (Order of Nov. 8, 1963, denying certain post-trial motions).

the decree by *one* of the parties to the litigation, Bethlehem, to seek to justify the court's ignoring the actual controversy between" Petitioners and the Union. Yet, the Union here is only an incidental and derivative beneficiary of the litigation, obviously joined solely because GSA contract No. GS-5 PC-1178 required apprentices to be employed under an approved apprenticeship program which in this instance was administered by a joint committee composed of Union and employer association representatives. Now, at this juncture, Petitioners seek to convert this lawsuit into a continuing controversy with the Union. If such controversy persists, as the Petitioners urge, it does not exist in any judicial sense in this case.[11] If Petitioners felt they had (or

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11. Admittedly, the Negro's problem cannot be solved unless decent jobs are made available to him. Unemployment and under employment compound themselves to impose an even greater feeling of inadequacy which in itself prohibits the acquisition of employment necessary to create a measure of self respect. Clearly, "equal opportunity," applied with traditional concepts of equality will produce very little, for the ability to compete equally does not exist because someone is now told he is equal, no more than the growth of labor unions could have occurred without the additional ingredient necessary to create equality—a recognition of the inequalities and affirmative steps to correct the same as reflected in Section 1 (Findings and Policies) of the National Labor Relations Act (61 Stat. 136, 29 USC § 151) (the "inequality of bargaining power", *etc.*). Here, however, we are confronted with a local apprenticeship program which at its maximum contains 50 apprentices with a waiting list perhaps two to three times its size. To prefer an applicant because he is negro (rather than not to discriminate because of such factor) is, of course, an act of "positive discrimination". *See,* Silberman, *Crisis in Black and White* (Random House, 1964) page 237. Eventually, the moral requirement of effective emancipation (both *de jure and de facto*) will perhaps become a national policy and steps will be taken to equalize the competitive inequality in this generation while attempting, through education in all its facets, to let it equalize itself in future generations. But until such time occurs, directly, openly and without the hypocrisy which oftentimes attends political expediency, a small segment of our society, namely potential apprentices who by reason of prior

have) a cause of action against the Union nothing has prohibited them (or prohibits them) from filing same so that the issues generated by the type of action filed can be resolved by litigation or otherwise.[12]

Petitioners' question presents nothing novel. There is no conflict among the Circuits and the Court of Appeals decided the issue in accordance with prior decisions of this court. GSA Contract No. GS-5 PC-1178—the subject matter of this litigation—has been performed and "passed beyond

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application for the apprenticeship program have at least equal rights, cannot be discriminated against or considered expendable. And this is so, even though admittedly, impartiality, even if genuine, will not close the gap. Handicaps of lack of education, training, experience, the absence of appropriate familial and social exposure from the time of cognition, are problems of all culturally deprived groups of which perhaps the Negro may be the prime example. Preference to obtain employment for several negroes on a federal project, even if tokenism (which this is) may be a step forward if accomplished voluntarily (despite the protestations against tokenism by some negro leaders). But preference, judicially imposed without a clear national policy that such preference is an adopted avenue necessary in the national interest to correct inequalities can only reverse and impede the progress of those attempting to have the vast majority of our population accept equality, logically and emotionally—the catalytic force necessary to correct operational inequality.

12. It would seem that separate and apart from other remedies, to the extent that the apprenticeship program is registered with the Department of Labor, an adequate remedy exists administratively. As regards discrimination within registered apprenticeship programs, and the remedies available to correct same, see the Regulations of the Secretary of Labor concerning equal opportunity, etc., Issued December 13, 1963, effective January 17, 1964, 28 F. R. 13775, 29 CFR, Subtitle A, Sections 30.1 to 30.16). Moreover, the recently enacted Civil Rights Act of 1964, PL 88-352, 78 Stat. 241, and more particularly Title VII thereof, offers an additional effective remedy if one claims there has been a violation.

recall." *Bronlow* v. *Schwartz*, 261 U. S. 216, 217 (1923).[13] As Petitioners' counsel expressed in open court at the commencement of the trial, the action would be "dissipated upon the performance of the contract." (Tr. 11). And the contract has been performed.[14] ". . . (I)t is a settled principle in this court that it will determine only actual matters in controversy essential to the decision of the particular case before it. Where . . . the existing controversy has come to an end, the case becomes moot and should be treated ac-

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13. This case involved a mandamus action to compel the granting of a building permit. The court held that the issuance of the permit rendered the case moot. See also, *Mills* v. *Green*, 159 U. S. 651, 657 (1895) (the holding of an election rendered moot an injunction suit alleging illegal discrimination of registration for the election). *Richardson* v. *McChesney*, 218 U. S. 487, 492 (1910) (suit to enjoin redistricting act mooted by election); *Blackman* v. *Stone*, 300 U. S. 641 (1936) (suit to compel certification on ballots of certain candidates mooted by election); *Cook* v. *Fortson*, 329 U. S. 675 (1946) (suit to enjoin certification of results of election, mooted by accomplishment of certification); *Standard Fashion Co.* v. *Magrane-Houston Co.*, 258 U. S. 346 (1922) (suit to restrain alleged violation of contract held not moot only because issue of damages remained in case; *Bus Employees* v. *Wisconsin Board*, 340 U. S. 416 (1951) (suit to set aside arbitrator's award on grounds of invalidity of statute held mooted by settlement agreement of parties).

14. The administrative agency cases cited by Petitioners such as *Local 74, United Brotherhood of Carpenters* v. *NLRB*, 341 U. S. 707 (1951) and *Federal Trade Commission* v. *Goodyear Rubber Company*, 304 U. S. 257 (1938) are obviously inapplicable because there, violations of a statutory enactment were charged and the particular administrative agency, within the authority granted it by Congress, could fashion an appropriate remedy balancing the interests of the parties and extending the scope of an order consistent with the facts of the case. *See, Communication Workers of America* v. *NLRB*, 362 U. S. 479 (1960). The "cease and desist" orders of the administrative agencies are clearly continuing in order to effectuate the policies of the particular Act and matters relating thereto are obviously not moot if the scope of the order is properly within the power of the agency. Here all we have is a suit filed to employ Petitioners on a particular project or to withhold payment to the particular contractor pending such employment.

cordingly. However convenient it might be to have decided the question . . . this court 'is not empowered to decide moot questions or abstract propositions, or to declare, for the government of future cases, principles or rules of law which cannot affect the results as to the thing in issue in the case before it. . . .'' *California* v. *San Pablo & Tulare R. R. Co.*, 149 U. S. 308, 314; *United States* v. *Hamburg American Line*, 239 U. S. 466, 475, 476 . . .'' *United States and Interstate Commenrce Commission* v. *Alaska Steamship Company, et al.*, 253 U.S. 113 (1920). The Court of Appeals properly followed the "established practice of (this Court) that when an issue or controversy becomes moot prior to or during an appeal . . . all prior orders should be vacated and the cause remanded with instructions to dismiss. *Railroad Trainmen* v. *Chicago & I. M. R. Co.*, 375 U.S. 18 (1963); *Davis* v. *Soja*, 374 U.S. 495 (1963)." (Ct. of Appeals Dec., Pet. App. 37 a). As it stated, "No relief within the scope of the complaint could now be granted." (Pet. App. 36 a).

## CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

BERNARD M. MAMET,
327 South La Salle Street,
Chicago, Illinois 60604,
HArrison 7-7630,

*Attorney for Respondent Local Union No. 1.*

Chicago, Illinois,
September 9, 1964.

# APPENDICES

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# APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

RONALD L. TODD and MICHAEL COCHRAN by his parents and next friends, Ulysses Cochran and Patricia Cochran, and JAMES HILL,

Plaintiffs,

vs.

JOINT APPRENTICESHIP COMMITTEE OF THE STEEL WORKERS OF CHICAGO AND INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL AND ORNAMENTAL IRON WORKERS LOCAL UNION NO. 1, Sidney I. Cole, Chairman, Frank D. Reiland, Treasurer, A. Walter Becker, Thomas Cannon, James Eads, Joseph Frankovic, Stanford Jacobs, and Edmund D. Flood, Apprentice Co-Ordinator, IRON WORKERS BRIDGE AND STRUCTURAL UNION, LOCAL NO. 1, Steve Zakula, President, Frank Pauley, Secretary-Treasurer, Joseph Frankovic, Job Representative, and Edmund D. Flood, Apprentice Co-Ordinator, IRON WORKERS DISTRICT COUNCIL OF CHICAGO & VICINITY, Leslie L. Myers, President, Robert Benson, Secretary and William Knapp, Vice-President; PASCHEN CONTRACTORS, INC., a Delaware corporation; PETER KIEWIT SONS' CO., a Nebraska corporation; BETHLEHEM STEEL COMPANY, a Delaware corporation; and DOMINIC TESAURO, Regional Administrator, General Services Administration,

Defendants.

No. 63-C-1739.

## COMPLAINT

Now comes DONALD L. TODD and MICHAEL COCHRAN, by his parents and next friends, Ulysses Cochran and Patricia Cochran, and JAMES HILL, all residents and citizens of the State of Illinois and of the United States of America by William R. Ming, Jr., and George N. Leighton, their attorneys, complaining of JOINT APPRENTICESHIP COMMITTEE OF THE STEEL WORKERS OF CHICAGO AND INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL AND ORNAMENTAL IRON WORKERS LOCAL UNION NO. 1, Sidney I. Cole, Chairman, Frank D. Reiland, Treasurer, A. Walter Becker, Thomas Cannon, James Eads, Joseph Frankovic, Stanford Jacobs, Edmund D. Flood, Apprentice Co-Ordinator; IRON WORKERS BRIDGE AND STRUCTURAL UNION, LOCAL NO. 1, Steve Zakula, President, Frank Pauley, Secretary-Treasurer, Joseph Frankovic, Job Representative, and Edmund D. Flood, Apprentice Co-Ordinator; and IRON WORKERS DISTRICT COUNCIL OF CHICAGO & VICINITY, Leslie L. Myers, President, Robert Benson, Secretary and William Knapp, Vice President, all of which organizations and individuals are sometimes collectively referred to hereinafter as the Union; Paschen Contractors, Inc., a Delaware corporation, and Peter Kiewit Sons' Co., a Nebraska corporation, hereinafter referred to as Contractors; BETHLEHEM STEEL COMPANY, a Delaware corporation, hereinafter referred to as Sub-Contractor; and DOMINIC TESAURO, Regional Administrator of the General Services Administration, hereinafter referred to as Administrator, hereby invoke the jurisdiction of this Court under the provisions of Title 28 U. S. C., Section 1331, in that the matter in controversy arises under the constitution and laws of the United States

and the amount in controversy is in excess of $10,000.00. For cause of action, plaintiffs allege:

1. On or about October 26, 1962, by Contract No. GS-5PC-1178 Contractors undertook and agreed to construct a United States Courthouse and Federal Office Building in Chicago, Illinois. One of the provisions of that contract was as follows:

> "In connection with the performance of work under this contract, the Contractor agrees as follows:
>
> (a) The Contractor will not discriminate because of race, creed, color or national origin. The Contractor will take affirmative action to ensure that applicants are employed, and that employees are treated during employment without regard to their race, creed, color, or national origin. Such action shall include, but not be limited to, the following: employment, upgrading, demotion or transfer; recruitment or recruitment advertising; layoff or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeship. The Contractor agrees to post in conspicuous places, available to employees and applicants for employment, notices to be provided by the Contracting Officer setting forth the provisions of this Nondiscrimination clause.
>
> (b) The Contractor will, in all solicitations or advertisements for employees placed by or on behalf of the Contractor, state that all qualified applicants will receive consideration for employment without regard to race, creed, color, or national origin.
>
> (c) The Contractor will send to each labor union or representative of workers with which he has a collective-bargaining agreement or other contract or understanding, a notice, to be provided by the agency Contracting Officer, advising the said labor union or workers' representative of the Contractor's commitments under this Nondiscrimination clause, and shall

post copies of the notice in conspicuous places available to the employees and applicants for employment.

(d) The Contractor will comply with all provisions of the Executive Order No. 10925 of March 6, 1961, and of the rules, regulations, and relevant orders of the President's Committee on Equal Employment Opportunity created thereby.

(e) The Contractor will furnish all information and reports required by Executive Order No. 10925 of March 6, 1961, and by the rules, regulations, and orders of the said Committee, or pursuant thereto, and will permit access to his books, records, and accounts by the contracting agency and the Committee for purposes of investigation to ascertain compliance with such rules, regulations, and orders.

(f) In the event of the Contractor's noncompliance with the Nondiscrimination clause of this contract or with any of the said rules, regulations, or orders, this contract may be canceled in whole or in part and the Contractor may be declared ineligible for further Government contracts in accordance with procedure authorized in Executive Order No. 10925 of March 6, 1961, and such other sanctions may be imposed and remedies invoked as provided in the said Executive order or by rule, regulations, or order of the President's Committee on Equal Employment Opportunity, or as otherwise provided by law.

(g) The Contractor will include the provisions of the foregoing paragraphs (a) through (f) in every subcontract or purchase order unless exempted by rules, regulations, or orders of the President's Committee on Equal Opportunity issued pursuant to section 303 of Executive Order No. 10925 of March 6, 1961, so that such provisions will be binding upon each subcontractor or vendor. The Contractor will take such action with respect to any subcontract or purchase order as the contracting agency may direct as a means of enforcing such provisions, including sanctions for noncompliance:

*Provided, however,* that in the event the Contractor becomes involved in, or is threatened with, litigation with a subcontractor or vendor as a result of such direction by the contracting agency, the Contractor may request the United States to enter into such litigation to protect the interests of the United States."

Another provision was as follows:

"Apprentices will be permitted to work only under a bona fide apprenticeship program registered with a State Apprenticeship Council which is recognized by the Federal Committee on Apprenticeship, U. S. Department of Labor; or if no such recognized Council exists in a State, under a program registered with the Bureau of Apprenticeship, U. S. Department of Labor."

At all times material herein there was in full force and effect in the State of Illinois, a bona fide apprenticeship program for iron workers which had been approved by the United States Department of Labor on September 30, 1952.

2. Under the provisions of the said iron workers apprenticeship program the only requirements for apprentices are:

"A. Applicants for apprenticeship shall be not less than eighteen (18) years of age nor more than thirty (30) years of age, have a pronounced aptitude and interest in this craft and be physically able to perform the required work.

B. They shall be American citizens or make declarations to become same, or Canadian citizens within the Dominion of Canada.

C. They shall provide proof of their age.

D. They shall keep such records of their apprenticeship training as may be required by the Committee."

3. Plaintiffs RONALD L. TODD, MICHAEL COCHRAN and JAMES HILL are twenty-three (23), twenty (20) and twenty-one (21) years of age respectively, and having been born in the United States, plaintiffs are citizens of the United States. They belong to the ethnic group commonly designated as Negroes. Plaintiffs and each of the persons who constitute the class to which plaintiffs belong have a pronounced aptitude and interest in the iron workers craft and are physically able to perform the required work. Each plaintiff provided proof of his age to the IRON WORKERS' JOINT APPRENTICESHIP COMMITTEE on or about the 12th day of June, 1963, and has demonstrated that he satisfies the minimum standards of education and experience for apprenticeship under the said apprenticeship program. Said Committee refused to certify plaintiffs as apprentices solely because of their race and color. Plaintiffs and each of the persons of the class to which plaintiffs belong are persons who are either without financial means or of limited financial ability to bear the necessary costs and expenses of these proceedings. Defendants, on the other hand, are corporations, associations and individuals, who own and control vast sums of resources and assets.

4. In April 1963 plaintiffs and each of them sought employment by the Sub-Contractor as an apprentice iron worker. Notwithstanding the application and qualifications of plaintiffs and each of the persons similarly situated, BETHLEHEM STEEL COMPANY has failed and refused to employ these persons or any of them to work on the project covered by Contract No. GS-5PC-1178 solely because of their race and color. For the same reason the Sub-Contractor has refused to employ any person as a structural iron worker who is a Negro. Moreover, though Contractors well-know all of the facts alleged herein to be true, Contractors

have failed and refused to take action, affirmative or otherwise to cause employment of plaintiffs.

5. The provisions of the contract quoted hereinbefore were entered into for the benefit of plaintiffs and persons similarly situated. Plaintiffs are members of a class of persons who, being residents and citizens of the United States, commonly designated as Negroes, are and have been for many years objects and victims of discrimination in employment and exclusion from certain classes and crafts of employment of which the craft of structural iron workers is one. The size of this class is so great and the number of persons so numerous that it would not be practicable for all such persons to join in this action. Plaintiffs therefore bring this action on their own individual behalf and on behalf of that class.

6. All of the defendants herein well know the truth of the allegations contained herein. Notwithstanding the aforesaid, none of the defendants has secured enforcement of the rights of the plaintiffs or the class they represent under the terms of Contract No. GS-5PC-1178. The plaintiffs have no remedy at law which would be adequate.

7. On or about the 6th day of March, 1961, the President of the United States issued Executive Order No. 10925, which provides, in part:

> "WHEREAS discrimination because of race, creed, color, or national origin is contrary to the Constitutional principles and policies of the United States; and
>
> WHEREAS it is the plain and positive obligation of the United States Government to promote and ensure equal opportunity for all qualified persons, without regard to race, creed, color, or national origin, employed or seeking employment with the Federal Government and on government contracts; and

WHEREAS it is the policy of the executive branch of the Government to encourage by positive measures equal opportunity for all qualified persons within the Government; and

WHEREAS it is in the general interest and welfare of the United States to promote its economy, security, and national defense through the most efficient and effective utilization of all available manpower; . . . ."

WHEREFORE, the plaintiffs respectively pray this Court to enjoin the defendants and each of them from proceeding with the performance of Contract No. GS-5PC-1178 unless and until plaintiffs and each of them is duly and regularly employed as an iron workers apprentice or in the alternative that this Court enjoin and restrain the defendants and each of them from making or receiving any payments on account of such contract unless and until plaintiffs and each of them is duly and regularly employed as an iron workers apprentice.

RONALD L. TODD

RONALD L. TODD and MICHAEL COCHRAN *by his parents and next friends, Ulysses Cochran and Patricia Cochran,* and JAMES HILL, *Plaintiffs*

By (s) WILLIAM R. MING, JR.

WILLIAM R. MING, JR.
GEORGE N. LEIGHTON
*Of Counsel*

## APPENDIX B

OF THE
Associated Steel Erectors of
Chicago
and
International Association of Bridge
Structural and Ornamental
Ironworkers
LOCAL UNION NO. 1

Frank D. Reiland
Treasurer
A. Walter Becker
Thomas Cannon
Joseph Frankovic
Stanford Jacobs

Bridgemen
Reinforcing Steel Setters
Structural Ironworkers

Edmund D. Flood
Apprentice Co-Ordinator
Brunswick 8-3439

Headquarters
2405 W. North Avenue
Chicago, Illinois 60647

January 16, 1964

Mr. Ronald Todd
7511 S. Yale Avenue
Chicago 20, Illinois

Dear Sir:

The apprenticeship training program sponsored by the Joint Apprenticeship Committee has in the past always selected its trainees on the basis of the individual applicant's qualifications. However, in an effort to carry out the President's Executive Orders No. 10925, as amended, and No. 11114, as well as No. 29-CFR, Part 30, "Non-Discrimination in Apprenticeship and Training", the Committee has adopted a new selection procedure which we would like to briefly outline in this letter.

Your application is presently on file with the Committee, and it has been our previous policy to call new trainees from these files primarily on the basis of the application date. In the future, we will make this selection based on a semi-annual re-evaluation of all the applicants, which re-evaluation will take into consideration a number of factors. The first, and most important change, is that we will now require an aptitude test. The Committee will then grade each applicant, taking into consideration not only his score on this aptitude test, but also all of the factors which will be brought out in his interview with the Committee. A new list will then be compiled based on the overall scores of each applicant.

It is the intention of the Committee to administer this test every six months, and after the test and interviews have been completed, a new list will be compiled. You can understand that this is necessary in order to give an opportunity to those applicants who apply after the original list is set up. This means that all those men who have applied as of the date of this letter, who are tested and who are put on the initial list, but who are not selected for training during the next six months, must then compete against the new applicants who are tested and interviewed prior to the beginning of the next selection period six months from now.

In order to carry out this new selection procedure, it will be necessary for you to execute a new questionaire form in the Committee's office, take the aptitude test, and be interviewed by the the Committee so that your total score can be determined. Because of the large number of applicants already in the Committee's files, it is necessary for us to schedule your appearance on a certain day, and you have been scheduled for 7:00 P. M., on Jan. 24, 1964. In the event you do not appear in the Committee's office on that

date, or if you do not contact the Committee office for a change in date, it will be understood that you are no longer interested in the apprenticeship training program, and your name will be dropped from our files.

Very truly yours,

Edmund D. Flood
Joint Apprenticeship Committee

## APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

| | |
|---|---|
| **RONALD L. TODD, et al.,** Plaintiffs, vs. **JOINT APPRENTICESHIP COMMITTEE OF THE STEEL WORKERS OF CHICAGO AND INTERNATIONAL ASSOCIATION OF BRIDGE STRUCTURAL AND ORNAMENTAL IRON WORKERS LOCAL UNION NO. 1, etc., et al.,** Defendants. | No. 63-C-1739. |

### MOTION

Now comes the plaintiffs by their attorneys, WILLIAM B. MING, JR., and GEORGE N. LEIGHTON, and respectfully move the Court for an order restraining the defendants JOINT APPRENTICESHIP COMMITTTEE OF THE ASSOCIATED STEEL ERECTORS OF CHICAGO and INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL IRONWORKERS, LOCAL UNION NO. 1, JAMES EADS, FRANK D. REILAND, A. WALTER BECKER, THOMAS CANNON, JOSEPH FRANKOVIC, STANFORD JACOBS and EDMUND D. FLOOD and each of them from altering, modifying or changing in any way the standards for selection of apprentices as they may apply to plaintiffs. In support of this motion plaintiffs show to the Court the following:

1. On November 8, 1963, *nunc pro tunc* as of October 16, 1963, this Court entered its decree of preliminary injunction against these defendants and others requiring them to certify two of these plaintiffs, RONALD L. TODD and JAMES HILL, as apprentice ironworkers. On motion of these defendants made on October 16, 1963, the provisions of this order were stayed pending appeal, and the Court fixed the amount of the appeal bond at $1,000.00.

2. On or about December 6, 1963, these defendants and others filed a notice of appeal to the Court of Appeals for the Seventh Circuit from the order of October 16, 1963. These defendants, however, have not filed any appeal bond. On the representation to counsel for plaintiffs by counsel for BETHLEHEM STEEL, one of the defendants herein who has also appealed from the decree of preliminary injunction, that the Clerk of this Court has been unable to complete preparation of the record on appeal counsel for plaintiffs stipulated that the time for filing that record should be extended to February 15, 1964, and by order of this Court of January 13, 1964, that was done.

3. On January 23, 1964, the plaintiffs brought to the attention of their counsel that each of them had been notified by letter from these defendants dated January 16, 1964, that each of these plaintiffs must take some "aptitude test," not otherwise described, to be given by these defendants on January 24, 1964, at 7:00 P. M. According to these letters (a copy of one is attached hereto marked Exhibit A) if any plaintiff does not appear for this test or otherwise contact these defendants "it will be understood that (they) are no longer interested in the apprenticeship training program" and his name "will be dropped from our (The Committe's) files.

4. Immediately on seeing Exhibit A, one of counsel for plaintiffs sought to communicate with Mr. Bernard M. Mamet who represents LOCAL UNION NO. 1 in this cause and Mr. Jerome A. Frazel, Jr., one of counsel for these defendants in this cause. The former asserted that he knew of changes in the apprenticeship standards but that he had nothing to do with their administration. The latter admitted that he had drafted the letter (Exhibit A) but had not provided, or attempted to provide, counsel for plaintiff with any notice or information concerning this matter. Thereupon counsel for plaintiffs orally notified Mr. Frazel that this motion for a protective order would be presented to this Court on January 24, 1964, at 10:00 A. M. Mr. Frazel agreed to be present at this time.

5. The demand by these defendants that plaintiffs take some test or other is a unilateral effort by these defendants to further harm and damage plaintiffs in their efforts to secure admission to this apprenticeship program from which plaintiffs have been excluded solely on account of their race or color, as this Court has found, in violation of this Court's decree of October 16, 1963.

6. Unless this Court now acts to protect plaintiffs and each of them, ,these defendants, and each of them, will continue their practice of exclusion of Negroes, including plaintiffs, from this program.

7. This is a class action brought on behalf of the named plaintiffs and all other Negroes. It is obvious that the requirements alluded to in Exhibit A vitally affect all of the members of the class. No notice has been given to the class. Though plaintiffs and their counsel adequately represent the class there is not sufficient time to enable plaintiffs or their counsel to investigate this matter and apprise the class concerning it. Accordingly, there is a grave pos-

sibility that defendants, and each of them, will do great harm and damage to the plaintiff class by this device unless defendants are restrained by this Court.

WHEREFORE, plaintiffs respectfully pray this Court to enter an order restraining these defendants and each of them from requiring the plaintiffs or any of them from taking any test for selection as apprentices, or in the alternative that the Court vacate its order staying the preliminary injunction and consider this motion a request for a rule to show cause as to why these defendants and each of them should not be held in contempt for violation of that injunction.

Respectfully submitted,

GEORGE N. LEIGHTON and
WILLIAM R. MING, JR.
*Attorneys for Plaintiffs*

By (s) WILLIAM R. MING, JR.,
WILLIAM R. MING, JR.
123 West Madison Street
Chicago, Illinois 60602
FRanklin 2-1106

## APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

| | |
|---|---|
| RONALD L. TODD, et al., Plaintiffs, vs. JOINT APPRENTICESHIP COMMITTEE OF THE STEEL WORKERS OF CHICAGO AND INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL AND ORNAMENTAL IRON WORKERS LOCAL UNION NO. 1, etc., et al., Defendants. | No. 63-C-1739. |

### ORDER

This cause coming on to be heard on the motion of the plaintiffs for a temporary restraining order and the following defendants being present by counsel in open court, namely: JOINT APPRENTICESHIP COMMITTEE by Jerome Frazel, Jr.; BETHLEHEM STEEL by Paul Conaghan; BOARD OF EDUCATION OF THE CITY OF CHICAGO by John T. Mehigan; DOST and TESAURO by John P. Crowley; and the Court having heard the arguments of counsel and being full advised in the premises:

IT IS HEREBY ORDERED that the defendants, JOINT APPRENTICESHIP COMMITTEE OF THE ASSOCIATED STEEL ERECTORS OF CHICAGO and INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL AND ORNAMENTAL IRONWORKERS, LOCAL

UNION NO. 1, JAMES EADS, FRANK D. REILAND, A. WALTER BECKER, THOMAS CANNON, JOSEPH FRANKOVIC, STANFORD JACOBS and EDMUND D. FLOOD, be and they are hereby restrained from requiring the plaintiffs or any of them, whether they are named plaintiffs or members of the class on whose behalf this action is brought, from taking any tests for selection as apprentice ironworkers or from otherwise adversely affecting the rights of the said plaintiffs and each of them to full and equal participation in the ironworkers apprenticeship program without discrimination on account of the race or color of the plaintiffs or any of them. This temporary restraining order shall remain in full force and effect until February 3, 1964, subject to further order of the Court.

ENTER:

(s) WALTER J. LABUY
WALTER J. LABUY

Dated: January 24, 1964.

FILE COPY

Office Supreme Court, U.S.
FILED
JAN 8 1965
JOHN F. DAVIS, CLERK

No. 550

# In the Supreme Court of the United States

OCTOBER TERM, 1964

RONALD L. TODD, ET AL., PETITIONERS

*v.*

JOINT APPRENTICESHIP COMMITTEE, ETC., AND BETHLEHEM STEEL COMPANY, AND LOCAL UNION NO. 1, ETC., ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT*

## MEMORANDUM FOR THE UNITED STATES

ARCHIBALD COX,
*Solicitor General,*
*Department of Justice,*
*Washington, D.C., 20530.*

# In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 380

RONALD L. TODD, ET AL., PETITIONERS

*v.*

JOINT APPRENTICESHIP COMMITTEE, ETC., AND BETHLEHEM STEEL COMPANY, AND LOCAL UNION NO. 1, ETC., ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT*

## MEMORANDUM FOR THE UNITED STATES

By order of the Court, dated November 9, 1964, the Solicitor General was invited to express the views of the United States with respect to this case. For the reasons outlined below, we believe that the decision of the court of appeals, ordering the complaint dismissed on the ground of mootness, was erroneous, at least with respect to respondents Joint Apprenticeship Committee (the Committee) and Iron Workers Bridge and Structural Union, Local No. 1 (the Union).

Petitioners are Negroes who alleged that, despite a "pronounced aptitude and interest in the iron workers craft" and physical ability "to perform the required

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work," they—and Negroes generally—have been excluded from the craft of structural iron workers (Union App. 6–7).[1] The complaint particularly focused on petitioners' exclusion from employment by Bethlehem in connection with the construction of the new United States Courthouse and Federal Office Building in Chicago, Illinois (Union App. 3), and sought an injunction restraining further performance of the courthouse project until each plaintiff "is duly and regularly employed as an iron workers apprentice" (Union App. 8). Respondents were included among the defendants.[2]

After a hearing, the district court found that the Union and the Committee had discriminated against petitioners by reason of their race (Pet. App. 20a); that this discrimination "could not have been accomplished without the aid and assistance" of the United States Department of Labor (whose Bureau of Apprenticeship had "registered" the Committee's apprenticeship program), the General Services Administration (which administered the contract and paid the contractors for the United States) and the Chicago Board of Education (which furnished classes for the apprenticeship program) (Pet. App. 21a); and that such discrimination was in violation of petitioners'

[1] "Union App." refers to the Appendix to the Brief in Opposition filed by the Union.

[2] Also joined as defendants were the Regional Administrator of the General Services Administration, an official of the Bureau of Apprenticeship of the Department of Labor, the Chicago Board of Education (which conducted classes which formed part of the apprenticeship program), and the prime contractors. These defendants were not parties to the appeal and are not before this Court.

right to equal protection of the law under the Fifth and Fourteenth Amendments (Pet. App. 19a–26a). On October 16, 1963, the district court orally entered a preliminary injunction, requiring the Committee to certify petitioners for indenture as apprentices and to cease discriminating against Negro applicants; requiring the Union to admit petitioners to membership as apprentices and to cease discriminating against Negro applicants, and requiring Bethlehem to employ petitioners as apprentice iron workers (Pet. App. 27a–28a). This order, which was made effective immediately, was stayed on the same day pending appeal (Tr. 938–940).

A week later, on October 23, 1963, Bethlehem's work on the courthouse project was completed. The formal order of the district court, entered on November 8, 1963 and made effective as of the date of the oral order, embodied the substance of the oral order as to respondents; it contained additional provisions as to the other defendants (not parties to this appeal).

The court of appeals held that completion of the courthouse project rendered the case moot, and it remanded to the district court with directions to dismiss the complaint.

1. The decision of the court of appeals was apparently based on the assumption that the sole object of the complaint was to obtain employment on the courthouse project, and that the case accordingly became moot upon completion of that project. Those portions of the district court order which have a continuing effect—the requirements that the Committee certify petitioners for indenture as appren-

tices and that the Union admit petitioners to membership as apprentices—were apparently disregarded by the court of appeals as not "within the scope of the complaint." 332 F. 2d at 247.

We believe that the court of appeals took an unduly narrow view of the complaint. It was alleged that the prime contract for the courthouse project provided that apprentices would be permitted to work only under an apprenticeship program registered with the Department of Labor (Union App. 5).[3] The complaint further alleged that the Committee had refused to certify petitioners as apprentices under the registered apprenticeship program for iron workers in force in Illinois (Union App. 5, 6). And, finally, the complaint sought an order enjoining further performance of the prime contract until petitioners are "duly and regularly" employed as iron worker apprentices (Union App. 8). In view of the wide scope of discretion which a trial court has in fashioning appropriate equitable relief, we do not think that the district court went beyond the scope of this complaint by granting a preliminary injunction which, instead of halting the courthouse project until petitioners were "duly and regularly" employed, ordered respondents to assure their future employment. This included certification of petitioners by the Committee for indenture as apprentice iron workers, and their admission to the

[3] The prime contract, in the alternative, permitted employment of apprentices under a program registered with a State Apprenticeship Council recognized by the Department of Labor. No such State Council was shown to exist in Illinois.

Union as apprentices, neither of which matters was rendered moot by completion of the project.[4]

Because of the nature of the construction industry workers move intermittently from project to project and employer to employer as the work to be performed by their craft on one site is completed and, on another, is begun. The labor practices and relations, however, are continuing. They--and usually the resulting disputes—survive the completion of particular projects. So here the ironworkers' apprenticeship program is continuing; it applies to new work within the union's jurisdiction. The racial discrimination of which plaintiffs complain also appears to be a continuing practice for no Negro has yet been employed as a journeyman or apprentice ironworker. In

[4] Petitioners' purpose to obtain admittance to the structural ironworkers craft as a necessary corollary of employment on the courthouse project is clear in light of the evidence as to the necessity for admittance to the apprenticeship program in order to learn and practice the craft. Petitioners alleged in the complaint that Negroes generally are excluded from the craft (Union App. 7). A Committee official testified that the Committee was established by agreement between the Union and the contractors' representatives, and that any contractor in the area employing ironworkers would be a party to the agreement (Tr. 679–680). Under the Apprenticeship Agreement which ironworker apprentices enter into with the Committee, the Committee undertakes to "furnish continuous employment, insofar as possible", and also agrees to supervise the apprentice's training, sending him to regular classes, giving him periodic tests, and seeing that he works for a number of different contractors so as to gain experience in all the facets of the craft. See Plaintiffs' Ex. 28, JAC Ex. 1, Tr. 389, 645, 667–668.

In short, admittance to the apprenticeship program, which the complaint sought as part of obtaining employment on the courthouse project, was equivalent to admittance to the craft from which petitioners alleged they were excluded as Negroes.

such circumstances it is well settled that the termination of the project on which a controversy first arises does not moot the cause of action. *Carpenters Union* v. *Labor Board,* 341 U.S. 707, 715; *Tobin* v. *Ramey,* 205 F. 2d 606 (C.A. 5), certiorari denied *sub nom. Hughes Construction Co.* v. *Secretary of Labor,* 346 U.S. 925; *Walling* v. *Haile Gold Mines,* 136 F. 2d 102 (C.A. 4); *cf. United States* v. *W. T. Grant Co.,* 345 U.S. 629, 633.

There is clearly a continuing controversy between petitioners, on the one hand, and the Union and the Committee on the other. The relief requested necessarily included certification of petitioners as indentured apprentices, and events have not made this requirement moot. Moreover, the order required the Union and the Committee to cease discriminating against Negro applicants and there was ample evidence that this continuing requirement was necessary to prevent future violations. The district court found that the Union had never had a Negro member (Pet. App. 7a). Likewise, since its establishment in 1952, the Committee had never indentured a Negro as an apprentice ironworker (Tr. 676–677). And continuous attempts by GSA officials in charge of the courthouse project to obtain certification of Negro ironworker apprentices had met with flat rejection (Tr. 182–276). In light of this history, the assertion of the Union and the Committee that they are ready to switch to a merit system (Union Brief 9, Appendix B) is hardly sufficient to moot the case.

2. It is less clear whether the requirement which the district court's order imposed on Bethlehem Steel

Company has been mooted by completion of the courthouse project.[5] There was testimony by a Mr. Pitchford, Bethlehem's Manager of Erection for the Western District (which included Chicago) and an employee in Bethlehem's Erection Department, Western District, since 1950, that he knew of no Negro ever having been employed as a structural iron worker or apprentice (Tr. 750). In addition, a Committee official testified that any contractor employing structural ironworkers in the area would be a party to the agreement establishing the Committee (Tr. 679–680). On the other hand, it is true that there was nothing in the complaint or in the evidence to indicate that petitioners were seeking employment with Bethlehem on any job other than the courthouse project. In the circumstances, we would not urge that there is compelling reason to retain Bethlehem as a party to the litigation.

3. In reaching an appropriate disposition of the case, the Court may wish to consider the prevailing circumstances. As we are advised, the present situation is as follows:

—The Committee has recently revised the standards for admission to the iron workers apprenticeship training program so as to conform to the non-discriminatory criteria required by the Department of Labor for a registered apprentice program. See 29 C.F.R., Part 30.

—On the other hand, it does not appear that any Negro applicant has yet been admitted to the appren-

[5] Both the oral order of October 16 and the later formal order required Bethlehem to employ petitioners as indentured apprentice iron workers, without language limiting the employment to the courthouse project (Pet. App. 28a, 65a–66a).

ticeship program. Petitioners have not been admitted. It is, however, too soon to judge fairly the practical operation of the Committee's new non-discriminatory standards.

—In light of the completion of the federal project and the Committee's adoption of new admission standards which are non-discriminatory on their face, the government can offer petitioners no extra-judicial remedy at this time.

—In July, 1965, however, Title VII of the Civil Rights Act of 1964 will become effective and new administrative and judicial procedures for processing grievances such as those advanced here will become available. See Section 703(d).[6]

In our view the facts just recited do not warrant closing, on the basis of an erroneous ruling concerning mootness, the only avenue of relief now open to plaintiffs against the racial injustice they allege. Racial discrimination affecting training and job opportunities is a singularly destructive evil. On the other hand, the theory of the complaint raises difficult constitutional questions, with far-reaching implications, that ought to be decided only after due deliberation by the lower courts in the light of the new remedies made available by the Civil Rights Act of 1964. We do not discuss these questions because all parties apparently agree that since the court of appeals did not reach the merits, the proper course, if this Court should disagree with the holding as to mootness, would be to follow *Federal Trade Commission* v. *Goodyear*

[6] Except as they may be continuing, the original acts of discrimination particularly charged here would be too stale for the administrative remedies provided in Title VII. See Section 706(d).

*Co.*, 304 U.S. 257, and remand the case to the court of appeals for further proceedings.

It is the submission of the United States, therefore, that certiorari should be granted and the case remanded to the court of appeals.

ARCHIBALD COX,
*Solicitor General.*

JANUARY 1965.

U.S. GOVERNMENT PRINTING OFFICE: 1965

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1964.

**No. 380**

RONALD L. TODD, ET AL.,

*Petitioners,*

*vs.*

JOINT APPRENTICESHIP COMMITTEE, ETC., AND BETHLEHEM STEEL COMPANY, AND LOCAL UNION NO. 1, ETC., ET AL.,

*Respondents.*

## BRIEF FOR RESPONDENTS, JOINT APPRENTICESHIP COMMITTEE OF THE STEEL WORKERS OF CHICAGO AND INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL AND ORNAMENTAL IRON WORKERS LOCAL UNION NO. 1, AND ITS NAMED OFFICERS AND OFFICIALS, IN RESPONSE TO MEMORANDUM FOR THE UNITED STATES.

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THE GUNTHORP-WARREN PRINTING COMPANY, CHICAGO

IN THE

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*Respondents.*

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TO THE HONORABLE THE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The Memorandum filed on behalf of the United States construes the Complaint as an attack on the alleged exclusion of Negroes from the craft of structural ironwork. It views plaintiffs' attempt to obtain work on the United States Courthouse and Federal Office Building in Chicago, Illinois, as only the particular focus of the Complaint. This construction is erroneous. The first paragraph of the Complaint is the predicate upon which the cause of action is based. This paragraph alleges the various provisions included in Contract No. GS-5PC-1178 to eliminate bias and discrimination.

The recommendation, contained in the Memorandum, that certiorari should be granted is apparently founded pri-

marily on the conclusion that the Complaint was broad enough to sustain the relief granted by the District Court in its preliminary injunction. The Complaint must be read as a whole. This shows the action to be nothing more than an attempt to secure the benefits plaintiffs claim were theirs under Contract No. GS-5PC-1178. Plaintiffs' Counsel summed up the case in just these terms. (Respondent Joint Apprenticeship Committee's Brief in Opposition, at page 13 and Transcript page 10.)

If the Memorandum's interpretation of the Complaint is incorrect, then the recommendation that certiorari should be granted is not well-founded. In addition, however, it goes beyond the record and apparently suggests that the Petition be granted because of events subsequent to the hearing and issuance of the temporary injunction.

Exception is taken to the conclusion that racial discrimination appears to be a continuing practice because no Negroes have yet been employed as journeymen or apprentice ironworkers. This conclusion is not based on any evidence contained in the record. On page 6 the Memorandum suggests that the efforts of GSA officials to obtain certification of Negro ironworker apprentices was met with an arbitrary and discriminatory attitude on the part of the Joint Apprenticeship Committee. The statement is made that there was a "flat rejection" of the attempts by the GSA officials. To the contrary, it should be noted (see page 661 of Transcript) that the basis of the Joint Apprenticeship Committee's refusal to accede to the demands of the GSA officials was based on its position that no preference should be shown to the plaintiffs, simply because they were Negroes. It was further based on the fact that there were many other young men waiting at that time to be indentured, and that the plaintiffs had been recruited to apply for apprenticeship training only as a result of the effort which was being made to pacify Negro groups bringing

pressure to bear on the Federal authorities. And finally, it was based on the fact that there were unemployed indentured apprentices available for work. Further, on page 6, the Memorandum notes that the Joint Apprenticeship Committee had never indentured a Negro as an apprentice ironworker since its formation in 1952. In making this observation, it fails to also note the very important testimony given by Mr. Flood, the Co-Ordinator of the Joint Apprenticeship Committee, at page 649 of the Transcript. He testified that during the period the Joint Apprenticeship Committee had been in existence, *no Negroes had ever applied for admission to the program* prior to the time plaintiffs Todd, Hill and Cochran applied. At this same point the Memorandum cites a letter contained in Appendix B to the Union's Brief in Opposition, which asserted that the Union and Committee were going to switch to a merit system of selection, thereby implying that prior to that time the system had been discriminatory. This implication is misleading because a reading of the letter cited shows that the Committee had always selected its trainees on the basis of the individual applicant's qualifications, and the chronology of his application.

In considering matters subsequent to the hearing, and outside the record, the Memorandum takes note of the fact that the Committee has revised its apprenticeship selection standards at the request of the Department of Labor. It then states that despite this, no Negro applicant has been admitted to the program. Here again, the implication is that a discriminatory selection policy existed and is still being followed. The Joint Apprenticeship Committee suggests that such a conclusion is completely unwarranted, and that it would be improper for this Court to give consideration to any of these matters subsequent to the hearing without having before it a full record of the circumstances and events which have transpired since that time. The

fact is, that three other Negroes took the first test under the new selection system put into effect in January, 1964, and are currently on the list awaiting indenturing. Plaintiffs in this action refused to take it. At the insistence of the Department of Labor and the Human Relations Commission of the City of Chicago, the results of the test given again in June of 1964 were "slotted" in among the results of the January, 1964 test. This caused the three Negroes to be dropped lower than they were before because other non-Negro boys in the June group attained higher scores. One Negro applicant is among the group who took the test in January, 1965.

There is a further implication that the Civil Rights Act of 1964 should have some bearing on this case. It is submitted that the resolution of the issues here must be had without reference to the legislation which was passed subsequent to the hearing and issuance of the temporary injunction. If, however, this Court decides that the Civil Rights Act of 1964 is relevant to the disposition of these issues, then it must also give consideration to the provisions of 42 U. S. C. A. § 2000e-2(j), which provides as follows:

> "Nothing contained in this subchapter shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to this subchapter to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by any employer, referred or classified for employment by any employment agency or labor organization, admitted to membership or classified by any labor organization, or admitted to, or employed in, any apprenticeship or other training program, in comparison with the total number or percentage of persons of such race, color, religion, sex,

> or national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area. Pub. L. 88-352, Title VII, § 703, July 2, 1964, 78 Stat. 255."

All of the evidence in this record covering the efforts made by the General Service Administration, the President's Committee on Equal Employment Opportunity, and the Department of Labor, clearly shows a design to obtain preferential treatment for Todd, Hill and Cochran. Congress apparently recognized that in the Government's efforts to afford Negroes their rights, these kind of abuses had developed. It sought to remedy them by including the above quoted provision in the Civil Rights Act of 1964.

The Memorandum states that because the Federal Courthouse project has been completed there is no extra-judicial remedy which the Government can give Petitioners. The implication here is that some effort must be made to fashion a judicial remedy regardless of the law. This argument seems to presuppose that judicial relief should be given even in the face of the clear law to the contrary. The Court should give no consideration to this argument.

In deciding the question of mootness presented by the Petition herein, the Court should be aware of the jurisdictional question which remains unresolved. It becomes important in analyzing the reason why no amendment to the Complaint was ever filed. All of the briefs have discussed the scope of the Complaint as it touches on the question of mootness. Why was no amendment filed changing this from ". . . a simple case in which the plaintiffs seek to enforce the contract as to which though they are not parties they are beneficiaries, and being beneficiaries, we assert their right to enforce that contract to secure the benefits intended for them." (Statement of plaintiff's Counsel, Transcript p. 10), to general attack on the allegedly discriminatory system? None was filed, because

in the absence of a connection with the Federal Office Building in Chicago there was clearly no jurisdiction in this case. This is why the entire cause of action was structured around the alleged rights which the Plaintiffs had pursuant to the contract for the construction of the Federal Office Building. It was only by filling this kind of suit that Plaintiffs had any hope of invoking the Court's jurisdiction. Plaintiffs recognized that the only cause of action they could possibly have was to obtain employment on the Federal Office Building, and it had to be predicated on their alleged rights under the non-bias provisions of Contract No. GS-5PC-1178.

This is why the Complaint has never been amended to fit the new controversy theory conceived by Plaintiffs to escape their mootness dilemma.

If any cause of action ever existed, it was in connection with the Federal Office Building. Its completion, *by others over whom the Joint Apprenticeship Committee had no control,* mooted the case insofar as the Respondent Joint Apprenticeship Committee is concerned.

Respondent Joint Apprenticeship Committee and its named officers and officials respectfully urge that the Petition for Writ of Certiorori be denied.

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NO. 380

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1964

RONALD L. TODD and MICHAEL COCHRAN, by his parents and next friends, ULYSSES COCHRAN and PATRICIA COCHRAN, and JAMES HILL,

*Petitioners,*

vs.

JOINT APPRENTICESHIP COMMITTEE OF THE STEEL WORKERS OF CHICAGO AND INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL AND ORNAMENTAL IRON WORKERS LOCAL UNION NO. 1, Sidney I. Cole, Chairman, Frank D. Reiland, Treasurer, A. Walter Becker, Thomas Cannon, James Eads, Joseph Frankovic, Stanford Jacobs, and Edmund D. Flood, Apprentice Co-Ordinator; IRON WORKERS BRIDGE AND STRUCTURAL UNION, LOCAL NO. 1, Steve Zakula, President, Frank Pauley, Secretary-Treasurer, Joseph Frankovic, Job Representative, and Edmund D. Flood, Apprentice Co-Ordinator; BETHLEHEM STEEL COMPANY, a Delaware corporation,

*Respondents.*

*On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit*

## RESPONDENT IRON WORKERS LOCAL UNION NO. 1 REPLY BRIEF TO SOLICITOR GENERAL'S MEMORANDUM

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1964

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**NO. 380**

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RONALD L. TODD and MICHAEL COCHRAN, by his parents and next friends, ULYSSES COCHRAN and PATRICIA COCHRAN, and JAMES HILL,

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vs.

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*Respondents.*

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*On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit*

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## RESPONDENT IRON WORKERS LOCAL UNION NO. 1 REPLY BRIEF TO SOLICITOR GENERAL'S MEMORANDUM

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LOCAL UNION NO. 1, IRON WORKERS (Union) has heretofore submitted its brief in opposition to the Peti-

tioner's request for a writ of certiorari. On November 9, 1964, the Court invited the Solicitor General to express his views concerning the instant matter and this Brief is in reply to the Solicitor General's Memorandum.

We submit that the Solicitor General has missed the thrust of the Court of Appeals' decision and the question presented for possible certiorari. All of the parties and the Court of Appeals have utilized the word "mootness" in discussing the present status of the case. While it is true that the case is "moot", from the standpoint of this Respondent the issue far exceeds any concept of ordinary mootness. Defendants in the trial of a cause have a basic right to rely upon the issues generated by a plaintiff's pleading or raised during the course of a trial. It is the plaintiff who initiates the lawsuit. It is the plaintiff who alleges the facts upon which he intends to rely and it is the plaintiff who sets forth the nature of his grievance and the relief he seeks. On the other hand, a defendant is not required to defend all lawsuits which might arise but only the particular lawsuit brought by the plaintiff. And, this underlies the Court of Appeals' decision and this is what the Solicitor General has overlooked. The Union submitted no evidence in this case because *this case* warranted no submission. During the course of the oral argument before the Court of Appeals the judges specifically inquired of counsel representing the various respondents whether or not in a lawsuit which raised the question of general and continued illegal discrimination, the Respondents would have evidence to introduce. This Respondent answered in the affirmative. The Court of Appeals specifically noted in its decision that "Some of the defendants introduced no evidence" (Pet. App. 34 a). And, the Court of Appeals concluded that "No relief within the scope of the complaint could now be granted." (Pet. App. 36 a). The issue then is not limited to mootness in its strictest sense but is more closely aligned to the question of

due process for to permit a lawsuit to be reframed, thus denying defendants their day in court, would be to deprive them of due process. As the Court of Appeals demonstrated in its decision—and as we point out in our original brief—from the outset, Petitioners confined their action to one involving employment at specific work by a specific contractor on a specific job at a specific location under a specific General Services Administration contract. Nothing else was litigated and Petitioners sought only to stop the project from proceeding or to have the General Services Administration withhold payments to the Bethlehem Steel Company (Bethlehem). The entire case revolved around Bethlehem and the Union in this case was only a derivative defendant because it had representatives on a Joint Apprenticeship Committee. Now, the Solicitor General suggests that the case as regards Bethlehem has been "mooted" (Brief, pg. 7) but has not been mooted as regards the derivative defendants against whom no relief was sought and, as regards this Respondent, against whom no specific allegation was made in the Complaint.

An examination of the Solicitor General's Memorandum reflects that the basis for his opinion is his apparent belief that there is a continuing controversy between Petitioners and the Union. This so-called "continuing controversy" has neither legal nor factual support. As pointed out in our original brief (pgs. 11 and 12, including fns. 11 and 12), if Petitioners feel they have a cause of action against the Union, nothing prohibits them from bringing it and, certainly, with the protections afforded under the new Civil Rights Act and through the Department of Labor, Petitioners' remedies are available and more than adequate. More important, the Joint Apprenticeship Committee and the instant Union have taken major steps not to correct nonexistent discrimination, but to offer equal opportunity. The

Solicitor General's facts, in this respect, are erroneous. His recital that the Union and the Joint Apprenticeship Committee "are ready to switch to a merit system" (Brief, pg. 6) has been phrased in the wrong tense. The certificate of registration of the Apprenticeship Program as issued by the Department of Labor was reissued on January 16, 1964, and the Apprenticeship Program met all of the requirements of the Department of Labor's equal opportunity standards which became effective January 17, 1964. On November 10, 1964, the Administrator of the Bureau of Apprenticeship and Training of the Department of Labor wrote the Joint Apprenticeship Committee expressing recognition of full conformance with the regulations of the Department and stating, that following a "field review", the Committee "is to be congratulated for affording equality of opportunity for apprenticeship regardless of race, color, creed, religion or national origin." (A copy of said letter is attached hereto as Appendix A). Information concerning apprenticeship has been and is being disseminated through an Apprenticeship Information Center maintained in Chicago under the auspices of the Illinois State Employment Service. Even though other applicants had been waiting their turn for indenture into the Apprenticeship Program, the Program was started anew with all applicants being placed on an equal footing in an order based upon pre-determined objective standards approved by the Department of Labor. Not only are there negroes who have taken the examinations, met the qualifications and been placed on the list, but additionally, the Joint Apprenticeship Committee has actively and overtly attempted to disseminate information concerning the Apprenticeship Program to all who might be interested. The Joint Apprenticeship Committee and the Union have, in fact, taken affirmative steps to hope to insure equal opportunity. If equal

opportunity did not exist prior to the taking of these steps, it was not due to the Respondents' failure to fulfill a duty imposed upon them, for there was no legal duty to search for applicants and if there were a moral duty it was never communicated to them or, in fact, to the bulk of the country.

In actuality, Petitioners here have no real interest to participate in the Apprenticeship Program as it is being administered under the auspices of the Department of Labor. They seek only to derive a benefit from a lawsuit in which the issues now claimed to exist were never presented or litigated (See our original brief, fns. 9 and 10, pgs. 9 and 10). The adoption and implementation of the new standards for admission into the Apprenticeship Program were done voluntarily and in an effort to cooperate with the national policy. At no point in the past had negroes been refused admission into the Union. To accuse a union of discrimination because no negroes sought admission would be to attribute guilt because the Union did not assume an affirmative burden to recruit negroes, as negroes, when no such burden was imposed upon the Union and when its mental processes had not even been exposed to the considerations of active cooperation as distinguished from the absence of discrimination. The efforts of the Union today far exceed its legal obligations and these efforts represent a genuine move toward participation in establishing equality of opportunity. As a national policy, preference in these situations has not as yet been adopted. Yet, this case represents nothing more than an effort to judicially impose preference disregarding the fact that the judicial imposition of preference in this case can come about only by ignoring the due process guarantee of having a day in court. And this is what the Court of Appeals was talking about when it examined the Complaint and the Record—when it found that certain defendants had not introduced evi-

dence and when it concluded that no relief within the scope of the Complaint could be granted.

We request that certiorari be denied. The reasons for our request are not limited to the due process considerations herein which have been merged under the overall label of "mootness". There are substantial practical considerations in this case. We suggest that progress has been made. We suggest that this progress has been more than substantial and differs widely from the type of tokenism Petitioners seek to accomplish by being able to claim that they have successfully sued an Apprenticeship Program and Union. This type of result would not only impede forward progress but would cause regression as well. As lawyers—as persons who, at least attempt to be socially aware, we can embrace both logically and emotionally concepts which exceed even those of equality. Defendants in a lawsuit of the type involved herein—particularly when they have been improperly accused of discriminating and being prejudiced—are not in a position, either individually or with their union membership, to prefer one class of persons as against another. The rank and file union membership understands and accepts the absence of discrimination and the presence of equality of opportunity. And, our national policy does not go beyond that. To say now that because a lawsuit was filed involving a specific job and a specific contractor, that this lawsuit will be used to impose preference is something that the rank and file membership will not be able to understand. And, we suggest that their understanding and cooperation, while not necessary to enforce a judicial decree, is essential to continued progress being made in exposing more negroes to the opportunities available. The Petitioners here have stubbornly ignored this and have seized upon the broad decree of the district court (entered *nunc pro tunc*) to have an order entered against this Respondent for what appears to be the pure sake of having such order

entered. Moreover, the conclusion of the Solicitor General (pg. 8) that "the only avenue of relief now open to plaintiffs against the racial injustice they allege" is to have this Court overrule the Court of Appeals is not only an erroneous evaluation of existing law, but additionally, completely avoids the due process considerations as regards this Respondent. The Solicitor General (pg. 8) recites that the "theory of the complaint raises difficult constitutional questions . . .". The question presented now, however, while a serious constitutional one, is much more serious from another standpoint. In all of the civil rights cases presented to this Court, the constitutional questions revolved around a substantive evaluation of what might have been encompassed by the Fifth or Fourteenth Amendment to the Constitution. At no time was the question presented of whether or not the defendants had their day in court—of whether the question ultimately sought to be determined by this Court had been fully litigated below and was based upon an appropriate complaint and issues generated in the case. Here the constitutional question is the deprivation of the defendants' right to defend a case and this was the basis of the Court of Appeals' ruling that no relief within the scope of the complaint could now be granted.

We request that certiorari be denied.

Respectfully submitted,

BERNARD M. MAMET,
Suite 1326,
327 S. La Salle Street,
Chicago, Illinois 60604,
HArrison 7-7630,

*Attorney for Respondent Local Union No. 1.*

Chicago, Illinois,

January 29, 1965.

## APPENDIX A

**U. S. DEPARTMENT OF LABOR**
**Bureau of Apprenticeship and Training**
**Washington 25, D. C.**

November 10, 196

Mr. James E. Eads, Chairman
Joint Apprenticeship Committee
International Association of
Bridge, Structural and Ornamental
Iron Workers for Local No. 1
2405 West North Avenue
Chicago, Illinois 60647

Dear Mr. Eads:

Your apprenticeship program has been reviewed an found to be in conformance with the "equal opportunit standards of CFR Title 29, Part 30, Nondiscrimination i Apprenticeship and Training, effective January 17, 1964."

We appreciate your cooperation with our State Supe visor, Mr. Joseph Sullivan, who made the field revie Your committee is to be congratulated for affording equa ity of opportunity for apprenticeship regardless of rac color, creed, religion or national origin.

Sincerely yours,

/s/ Hugh C. Murphy
Hugh C. Murphy
Administrator